Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THANH VONG HOAI,
Petitioner,

SUN REFINING AND MARKETING COMPANY, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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60 pp

QUESTIONS PRESENTED

1) Are damages under the Petroleum Marketing Practices Act limited by the contract term where the franchisee is driven from the station and it is given to another by the private act of the franchisor and that other party ?

2) Does the pre-emption of 15 U.S.C. 2806 (a) or does it not preclude overlapping tort actions with separate damages ?

3) Are exemplary damages under the PMPA limited to the those that are simply "wilfull" or do they include those where there is "wilfull disregard" of the Act or the rights of the franchisee thereunder as stated in the Act ?

4) Is there a doctrine of waiver or estoppel under the PMPA ?

5) May a franchisor create a situation barring further contract performance by a franchisee and then use that to limit its own damages for an illegal termination and nonrenewal under the PMPA ?

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STATUTES, RULES

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DIGESTS, TREATISES

*"Pre-emptive Scope of §106(a)
of Petroleum Marketing
Practices Act (15 U.S.C.
2806(a))" 103 ALR Fed 698 46

*Indicates authority principally
relied upon

THANH VONG HOAI,
Petitioner,

v.

SUN REFINING AND MARKETING COMPANY, INC.,
Respondent.

Petition For The Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this matter on March 9, 1994, rehearing denied May 25, 1994.

OPINIONS BELOW

The opinions below were not reported. They are all reproduced in the appendix. An interlocutory appeal won by petitioner which is not before this Court was reported: Haoi v Sun Refining and Marketing, Inc.. (CA DC 1989) 866 F2d 1515.

JURISDICTION

Petition for rehearing was denied May 25, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Petroleum Marketing Practices Act, Part I, 15 U.S.C. 2801 et seq. set out in the appendix and §§ 225 and 226(b) of the D.C. Retail Service Station Act, also set out in the appendix.

STATEMENT OF THE CASE

This is a dealer's suit under the Petroleum Marketing Practices Act, (PMPA) 15 U.S.C. 2801 et seq., ("the Act"). It was brought pursuant to the enforcement provisions of 15 U.S.C. 2805 for an "improper termination"[1] by which Thanh Vong

[1]Hoai had previously been a dealer for Sun at another location in Greenbelt, Maryland. Att. to complaint, Greenbelt documents, App. pp. This is important because by 15 U.S.C. 2803 (b)(1)(B) it means that Hoai was a franchisee governed exclusively by 15 U.S.C. 2802 and not a trial franchisee governed by 15 U.S.C. 2803 despite pronouncements by the district court and Sun to the contrary throughout the proceedings.

Hoai's (rhymes with joy) "business was destroyed and his business reputation and livelihood severely damaged". Hoai alleged in the alternative that his franchise was nonrenewed and claimed compensatory damages of thirty million dollars for a twenty year business. Hoai also asked for a "declaratory judgment that the act prevents disorderly transfers in violation of its terms in which franchisors knowingly cooperate with wrongdoers and tortfeasors who they well know are engaging in fraud and extortion."

The respondent, defendant below, is Sun Refining and Marketing Company, Inc. (Sun or Sunoco) The illegal termination, as to which Hoai was granted summary judgment on liability alone, (App. 7 ff.) was accomplished in an unusual way not similar to other reported cases under the Act but which brings up significant issues under the Act which are worthy of review:

Sun had encouraged Hoai to regain control of his station which he had informed them had been taken over by a fellow Vietnamese, one Vo, who was threatening Hoai with murder and bodily harm. Vo had taken control of the station after its opening on April 10, 1986. Vo purported to be a fellow Vietnamese businessman making a friendly loan for half of start up capital. The loan was revealed as fraudulent by the return of a check for insufficient funds which had been drawn on the station account which Vo was controlling. Hoai learned of this from Prendergast, a Sun financial officer in Philadelphia, who notified Hoai that the check had to be made good and that credit terms would be altered. When Hoai confronted Vo and Vo's

colleague Thach, the threats of physical violence began.[2]

Ultimately Hoai, under threat, was forced to sign a one page document. Subsequently Vo and his colleague Thach added two pages to it which Hoai was not shown, with differing page number references showing that it appeared on its face to be fabricated from differing documents, in which Vo purported to buy the business for one dollar. Hoai never had even the single page prior to litigation and thus did not submit it to Sun for approval. He did inform Sun of the threats and duress and his desire to keep his franchise and oust Vo and received their encouragement

[2]These issues have never been allowed to reach the merits in any court. Hoai's testimony on them was allowed in one TRO hearing in 1986 in the Superior Court, discussed herein. Vo was present and declined to testify as he did in the trial of this case. Thus the contention that this matter is much litigated is a bit misleading if it is meant to indicate that the merits of these contentions have been reached. They have not.

and support to rectify the situation and oust Vo as was attested to by Peele, Vaughn and others from Sun.

Hoai reentered the station, on Pennsylvania Avenue, S.E., in the District of Columbia, August 25, 1986. He had with him his then attorney, John D. Hemenway and one of Hemenway's sons. They carried a notice to quit the premises similar to those required of landlords under D.C. Code 45-1401 et seq. Vo was away from the station at the time. The employees who were there left. There were police officers present the entire time who attested to the peacefulness of Hoai's return. Vo's attorney and a colleague, Thach, appeared. A settlement of the dispute was agreed to whereby the parties would abide by the word of Sun's area representative, Ernest Peele, who was to come to the station the following day. An inventory was to be taken and whichever

party was not the dealer was to pay the other for funds expended.

The next day Peele came and declared that Hoai was Sun's dealer. Vo did not abide by the agreement. Instead he filed preemptively against Hoai, the Hemenways and Sun in the Superior Court of the District of Columbia, alleging various torts such as interference with contract, etc. He simultaneously requested a TRO. At the TRO hearing the Superior Court judge sua sponte introduced the concept of the tort of wrongful eviction, requested Vo to amend his complaint to include that tort, issued a 10 day TRO barring Hoai from the station and gave it to Vo. She ignored the testimony of Hoai, Peele and the Hemenways as to violence and threats. Vo was present but did not testify. Nor did he present any other witnesses. His atttorneys testified for him with the encouragement of the judge and were only too

happy to accede to her desire to have Hoai, the Hemenways and Sun have committed, if only for 10 days, the tort of wrongful eviction. She promised Hoai he would have a hearing in 10 days to straighten out those and other matters.

That hearing was never held, however. Instead Sun[3] chose on September 8, 1986, at the end of the TRO period, to enter into a consent order with Vo without any notice to Hoai. This was done on the advice of Vo's counsel that it would be a way to avoid a preliminary injunction hearing under Rule 65.[4] Hoai and the Hemenways and their counsel were never informed of this matter until it had been

[3]Sun could have simply moved to dismiss under D.C. Code 10-226 (b) as all Vo's complaints against Sun were based on the idea that Sun had refused transfer of the franchise to him under the one dollar contract which Hoai had never submitted to Sun for approval but which he had told them about as having been coerced from him.

[4]For all practical purposes Rule 65 of the Rules of the Superior Court of the District is the same as Federal Rule 65.

entered into between Vo and Sun, filed in the Superior Court and signed by a judge sitting as an emergency judge in chambers.[5] Only then was the consent order served upon counsel for Hoai and the Hemenways. It is this consent order which Hoai sued upon in this case as the act of illegal termination of his franchise which destroyed his business and business reputation and with regard to which he sought damages both compensatory and punitive and a declaratory judgment.

A little less than a year later Hoai filed the present suit. Sun moved to dismiss and the district court denied the motion but entered sua sponte an order staying the matter pending the outcome of the

[5]This activity formed the basis of an unsuccessful suit by Hoai and the Hemenways under 42 U.S.C. 1983 since the rule governing judge in chambers then allowed such practice without due process. Subsequently the Superior Court changed the rule governing judge in chambers to eliminate this objectionable feature and restrict the judge in chambers.

proceedings in the Superior Court, where Hoai and the Hemenways had, in the meantime, filed counterclaims against Vo, Sun and Vo's colleagues such as Thach.[6]

Hoai then won an interlocutory appeal lifting the stay Hoai v Sun Refining and Marketing Co., Inc. (1989) 866 F2d 1517. Upon remand Hoai moved for summary judgment on liability, relying upon the appellate holding that the consent order was a private and voluntary act between Vo and Sun which did not involve any independent judgment of the Superior Court. Sun, at

[6]Hoai also filed against Vo and Vo's colleagues such as Thach in the Eastern District of Virginia. That suit was dismissed upon motion for want of a showing of pattern of racketeering activity on the basis that the two businesses taken from Hoai, the gas station and a food business in which his wife was active, were taken pursuant to a single scheme. Subsequent appeals to the fourth circuit and a petition to this court were rejected. Cert was denied by this Court just months before its decision in H.J., Inc. v Northwestern Bell Telephone Co (1989) 109 SCt 2893.

the invitation of the court, filed a cross motion supported by numerous documents.

Hoai challenged this Sun motion, particularly with motions directed to striking or disallowing a number of its exhibits. Of particular relevance was Hoai's motion to exclude the so-called contract of sale of the station for a dollar on the grounds that its notations at the bottom made it out to be an altered or composite document on its face, which was in accord with Hoai's story in deposition that he had been compelled under severe threat to sign, and was only shown, the last of the three pages, the other two never having been seen by him until the litigation.

In addition Hoai specifically requested a waiver and/or estoppel of the reliance placed by Sun upon Vo and the alleged one dollar contract inasmuch as Sun had encouraged him to regain the station from Vo, making it clear he would lose his

franchise if he did not, had completely rejected Vo's claims and had in every way confirmed Hoai as their dealer right up to the time when Sun made the deal with Vo to enter the consent order giving the station to Vo in Hoai's stead which was entered September 8, 1986. Further, Hoai, acting in reliance on Sun's representations, had risked his life and the safety of his family in standing up to Vo and Thach, had hired two attorneys and had undergone considerable expense and effort to get his station back at Sun's suggestion.

On October 1, 1990, the district court granted Hoai's motion for summary judgment and denied that of Sun, declaring most, but not all, of Hoai's motions moot. Matters went forward toward a trial on the damages.

Sun filed a motion in limine for determination of damages on November 15, 1990 in which it requested that the

damages be limited to the period from the termination on September 8, 1986 until the end of the franchise agreement term on April 27, 1986, which date, it argued, was the date the franchise was "actually terminated," thus raising for the first time in the case the concept of a false termination versus an actual termination where the termination has been ruled illegal in the first instance.

On December 21, 1990 Sun filed a second motion in limine for evidentiary rulings, asserting that the district court had "already ruled" that Hoai's franchise was improperly terminated on September 8, 1986 and "was actually terminated with notice on April 28, 1986."[7] Sun requested that Hoai's history as an operator of service stations, including his former sun sta-

[7]The record reveals no such ruling and the October 1, 1990 opinion is to the contrary. This illustrates a process of accretion by which Sun was allowed to dictate the law of this case despite the actual law of the case.

tion, be excluded, that the threats against Hoai be excluded, that the counsel for Sun not be recused in order that he might testify as to his role on punitive damages, (proffering, however, that Sun would use advice of counsel as a defense to the claim for exemplary damages pursuant to Eden v Amoco, infra (D Md 1990)) and that the claim for punitive damages be stricken because no evidence had yet been produced. Both motions were opposed.

On February 28, 1991 the district court granted Sun's motion to limit the damages to the period from September 8, 1986 through April 27 [sic], 1987, granting to Hoai the right to develop evidence that the franchise "would have extended beyond April 27, 1986 but for the 'termination' on September 8, 1986." thus wiping out the effect of 15 U.S.C. 2802 (a) and reversing the burden imposed by that section as well

as that imposed upon franchisors by 15 U.S.C. 2805 (c).

Hoai's subsequent motion to alter this ruling in light of the statute's actual language and the burdens it imposes was denied. In denying that motion to alter the ruling the district court ruled that "actual damages" as used in 15 U.S.C. 2805 does not include tortious type damages or anything other than strict contract damages. The district court ruled that Hoai could have pursued tort claims under state law separately, citing O'Shea v Amoco Oil Co. (CA3 1989) 886 F2d 584 and Bellmore v Mobil Oil Corp. (CA2 1986) and that the preemption provisions of 15 U.S.C. 2806 do not exclude tort claims under state law that may grow out of an illegal termination under the PMPA. Hoai should have brought such tort claims separately, the district court held. It also held that the Act did not allow for

damages for emotional disturbance or distress. It also ruled out special damages as sought by Hoai under D.C. law, which allows such damages. The court ruled that Sun was only trying to extricate itself from the dispute between Hoai and Vo.

Hoai moved to have the attorney client privilege waived for Sun's attorneys so that they might be deposed on matters concerning punitive damages. That was denied. Earlier Hoai's motions to depose the principle in-house Sun counsel involved, Jeffrey Wagner, were denied and Wagner was moved by Sun to Tulsa.

Hoai also moved for partial summary judgment to exclude Sun's use of its purported theory, supported by its letters addressed to Hoai but delivered to the station it had given to Vo, that it had "actually" terminated Hoai on April 27, 1987 after it had illegally terminated him on September 8, 1986. It was denied on

the basis that Hoai was responsible for the station even after he was ousted by the consent decree because the Superior Court not Sun had given the station to Vo. Memorandum and Order, June 3, 1991.

On June 6, 1991 Hoai again moved to disqualify Sun's counsel so that he might testify on punitives. It was denied.

In a supplemental pre-trial order on June 28, 1991, the district court invited Sun to file a further motion limiting Hoai's damages to the contract term, speaking of Sun's right to terminate or nonrenew Hoai after the illegal termination of September 8, 1986. This time the court opined that Sun had the right to do this once "it found Hoai enmeshed in his conflict with Vo". However, despite announcing that Hoai might not recover for damages beyond April 27, 1987, the district court, nonetheless, invited Sun to

file another motion on the subject, this time for partial summary judgment.[8]

Again the court restricted damages to what it called contract damages. Declaring it unclear whether there was an actual issue as to punitive damages, the court referred to the "inchoate state of the law on the PMPA at that time" and indicated its doubt in light of that perception, that Sun could have acted in willful disregard of the law (no mention of Hoai's rights under the law) and invited Sun to file a summary judgment motion on the point. In a final move to protect Sun counsel, the court then ruled that Hoai's

[8]It should be noted that Hoai repeatedly opposed these restrictions based not only on the language of the Act itself, but also on local contract law, particularly the prevention doctrine, inasmuch as Sun had created the situation with Vo by switching its allegiance to him which it then used as the excuse for its so-called actual termination or nonrenewal and also the D.C. law that a massive breach of a contract by one party excuses the other from any further obligation to perform. Fowler v A & A Company (DCCA 1970) 262 A2d 344, 348, n.6.

last motion to disqualify Sun counsel J. Gordon Forester would be denied because his testimony would not be relevant to actual damages[9] and because there were four others who could testify about Sun's decision to enter into the September 8, 1986 consent decree which was the illegal termination.[10]

Accepting the invitation of the district court, on July 11, 1991 Sun moved for summary judgment on exemplary damages and Hoai opposed. On July 26, 1991 Sun again moved for summary judgment to limit the damages to the period from September 8, 1986 to April 27, 1987 and was opposed. On September 16, 1991, the district court again granted a Sun motion to limit the damages to the contract term in a further memorandum and order. This memorandum and

[9]Hoai had never contended that it was.

[10]Actually there were two and the only other one who was a Sun employee had been sent to Tulsa, where the court had refused to allow plaintiff to get at him by telephone, Hoai's only practical avenue.

order was that the contract damages would be limited to the period September 8, 1986 through March 27, 1987.[11] It based this decision on 15 U.S.C. 2803, the trial franchise section of the Act.[12]

Trial on compensatory damages began on Monday, October 7, 1991 and continued through Friday, October 11, 1991. At the trial Hoai's lengthy history of operating gas stations, including operating a number of them as an in-house manager or overseer for Sun, was established over vigorous opposition from Sun. Most dramatically evidence from Hoai that he had been paid bonuses for successful operation through Mascot Petroleum, a Sun entity used then

[11]This would appear to be a mistake. All other orders spoke of the term as from September 8, 1986 to April 27, 1987 and that was the term used at trial.

[12]As pointed out earlier, by 15 U.S.C. 2803(b)(1)(B) Hoai, having previously been a Sun dealer in Greenbelt, Maryland, cannot have been, by statutory law, a trial franchisee in the present instance, a point which eluded the district court throughout.

for that purpose among others, belied testimony by Sun employees, the key one of whom had been placed on "leave" pending the outcome of the trial, to the contrary. At the trial also there was uncontradicted and unrebutted testimony that Vo, by comparison, had no knowledge whatsoever or experience of operating a station and working with cars, and did not even know how to check the oil until shown how to do so by Hoai. As at the TRO hearing in the Superior Court, Vo was present at times but in the end declined to take the stand and testify.

The jury awarded Hoai compensatory damages for the remaining term of the franchise in the amount of $65,000. The jury was not allowd to consider damages beyond the contract term or damages for anything other than lost profits. A subsequent motion for judgment NOV by Sun was ultimately denied on May 12, 1992 and the

appeals leading to this petition then ensued.

On October 11, 1994, the last day of trial, Hoai filed his own motion for summary judgment on exemplary damages under the Act, asking for $650,000, or 10 times the jury award. On October 28, 1991 the district court granted Sun's motion for summary judgment dismissing Hoai's claim for exemplary damages and denied Hoai's crossing motion.

In doing so the district court indicated that it was ruling without a trial because plaintiff at the end of the jury trial had indicated through counsel that he would prefer to try the exemplary damages on another day, having just finished the week-long jury trial on exemplary damages. No advance warning had been given that trial of the exemplary damages on that day would be required and indeed, it had been indicated that the matter of exemplary damages

would be tried separately as has been the case in all reported cases.

The district court based its October 28, 1991 decision on the exemplary damages upon motion on Eden v Amoco Oil Co. (DMd 1990) 741 FSupp 1192 and on cases cited in that case, namely this Court's decisions in Trans World Airlines, Inc. v Thurston (1985) 469 US 111 and McLaughlin v Richland Shoe Co. (1988) 486 US 128. "Willful", in the context of the PMPA, the district court held, indicates an "act that is not merely negligent but can be said to have been taken with deliberate or intentional disregard to the requirements of the statute."

The district court also held that an award of exemplary damages under the Act requires a "clear and affirmative showing of a deliberate and intentional act on the part of the defendant.", citing Midwest Petroleum Co. v American Petrofina Maktg.,

Inc. (ED Mo 1986) 644 FSupp 1067, Noe v Mobil Oil Corp. (ED Mo 1980) 503 FSupp 213, and Clark v Mobil Oil Corp. (ED Mo 1980) 496 FSupp 132. The district court then held that there was no such showing by Hoai.

By this time it was calling the September 8, 1986 termination a "de facto" termination" and the purported subsequent termination on April 27, 1987 the "final termination." The district court held that Sun would have continued to deliver fuel to Hoai at his station had he not been removed from it by the Superior Court TRO. It held that Joseph Zulli, the boss at Sun's in-house legal department of Jeffrey Wagner, the attorney who had been sent to Tulsa and kept from being deposed by Hoai, had testified in deposition that Sun was unaware, when it entered into the consent order with Vo on September 8, 1986, that it was terminating Hoai's fran-

chise. In other words, members of the bar may take a franchise from A and give it to B at the expiration of a TRO temporarily awarding it to B and be unaware that they are affecting A. Zulli actually had testified that he knew little about details of the negotiations by Wagner, the Sun attorney who actually conducted the negotiations for the action which constituted the illegal termination.

Wagner was transferred to the Pipeline Division in Tulsa after the onset of this litigation where Hoai, (who could not afford to go to Tulsa to depose Vo) was forbidden by the Court to depose Wagner by telephone. The deposition of Vo's attorney, Roseman, as to the other end of those negotiations, which was on file, made it amply clear that the only concern of Sun in negotiating the deal that led to Vo being substituted for Hoai in control of the station and its branded fuel supply after the entry of the consent order in

the Superior Court without notice to Hoai was how to avoid a follow-on hearing under Rule 65[13] so that Vo might be continued in the station in Hoai's stead. There was no concern for the effect of the PMPA as it related to Hoai as the legitimate franchisee once the TRO had expired and certainly none whatsoever for Hoai's rights under 15 U.S.C. 2802.[14]

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[13]It should be pointed out, because it was never taken cognizance of below despite Hoai's attempts to point it out, that the ruling of the Superior Court judge on the TRO was only on a procedural point. Had Hoai really been a landlord and had he been able to use the summary eviction procedures of the L&T Branch he could have cured the supposed tort introduced into the matter by the TRO judge and, since Vo was given the station, Vo suffered no harm by the supposed wrongful eviction in any case. Had there been a full preliminary injunction hearing there would have been opportunity to demonstrate that Hoai was not a landlord, Vo was not a legitimate franchisee or transferee and that Vo had no right of action against Sun (D.C. Code 10-226(b)) and none against Hoai.

[14]As we have pointed out the district court never seemed to get it straight that Hoai could not have been a trial franchisee under 2803 because he had previously been a Sun dealer in another location.

The district court acknowledged that Sun did, in terminating Hoai, disregard the PMPA, relying on its lawyers in doing so. However, the district court held, the "undisputed facts preclude a finding that Sun acted with 'a consciousness of wrongdoing or with a considered disregard to whether it violated the Act." citing Eden. A good deal of the reasoning behind this opinion is beyond the ken of the petitioner to fathom. But part of the basis was that Sun had relied upon the advice of the lawyers whom the district court had prevented Hoai from using as witnesses. It also inaccurately stated, among other reasons which seem irrelevant to petitioner, as part of the basis of its opinion that Hoai had failed to effectively pursue local remedies.[15]

[15]Hoai had filed counterclaims, moved for judgment and pursued all other remedies in the D.C. Superior Court, a fact which was noted in Hoai v Sun, supra. There has been no effect to these remedies because that court stayed its hand pending the outcome of this litigation.

"Sun's actions", the district court held, "show no considered disregard of the PMPA but rather a practical business judgment in a difficult situation created by others." This would seem to be irrelevant. No mention was made of Hoai's rights under the Act in accordance with its actual language. Siding with a person that Sun acknowledged it knew according to Hoai had threatened to kill Hoai was deemed by the district court to have been "passive" and exemplary damages, therefor, were deemed "inappropriate."

Appeals ensued. The appeals of the compensatory damage issues were joined with those of the exemplary damage issues. Sun cross-appealed on the jury award and the denial of its motion for judgment NOV as well as the summary judgment against it on liability. The appeals court affirmed all

decisions without comment, denied Hoai's petition for rehearing and suggestion for a rehearing en banc and now Hoai makes this petition.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve conflicts in principle among lower courts, and in certain cases, particularly as here, where the appellate court appears to some extent to have avoided tackling the issues by affirming the district court without comment, the writ should be granted where that conflict is exemplified by the decision of the district court as affirmed without comment.

Here there is serious conflict among the circuits on the question of federal preemption by the PMPA under 15 U.S.C. 2806. That conflict was exemplified in the district court decisions here in a manner that also gratuitously wiped out the very core of the PMPA, its creation of

the concept of the "franchise relationship", defined by, but not confined by, the franchise (which is defined as a contract), and eliminated altogether the really signficant lever in the Act for carrying out its intended purpose of levelling the playing field between franchisors and franchisees.

Here the limiting of the type of damages that might be recovered, in light of the unusual circumstances of the case, which was based on the preemption ruling, had the effect of making the concept of the franchise relationship, as assumed in the only real decisions reported on this matter in other circuits, meaningless. We speak particularly of what has become the lead case on "actual damages" under the Act as that phrase is used in 15 U.S.C. 2805(d)(1)(A), Thompson v Kerr-McGee Refining Corp. (CA10 1981) 660 F2d 1380, cert. den. 455 US 1019 (1982). In that

case the franchisor singled out Mr. Thompson and, treating him differently from other franchisors, terminated and non-renewed his franchise, just as was done here. The tenth circuit upheld a jury award based upon Thompson's average income from operating the station previously and then projected it on a reasonable basis over the next six years, which, the tenth circuit confirmed, was reasonable based his then age of 44. The damages were not limited to the contract term. It was recognized that Kerr-McGee's breaking off of its relationship with Thompson was sufficiently complete that it destroyed his business for the next six years.

In the present case the district court allowed Hoai to prove his damages on the basis of his prior operation of other stations, including Sun stations both as a franchisee and an in-house supervisor. The district court, however, did not allow

Hoai to project a reasonable life for his business based on his age, his reasonable expectations and the actual damage that he incurred as a result of the illegal termination and subsequent nonrenewal in the years after the termination and nonrenewal occurred. This puts the decision here in conflict with the 10th Circuit in Thompson as the lead case.

The district court here so limited the damages on no less than three occasions in three different opinions. In one of those opinions, its May 1, 1991, memorandum supporting its denial of Hoai's motion to alter or amend its earlier ruling on this point, it relied on Thompson, supra, id. at 1388 and also on Lippo v Mobil Oil Corp. (CA7 1985) 776 F2d 706, 716 and Midwest Petroleum Co. v American Petrofina Marketing, Inc. (ED Mo 1986) 644 FSupp 1067, 1070. App 41 An examination of Lippo and Midwest Petroleum, however,

reveals that the decision here is at odds with those cases as well. In neither case was the contract term determinative of the time limit placed upon reasonably projected future damages.

In Midwest, a case in the 8th Circuit, the time limitation was created by the fact that the plaintiff had, a year after losing the site, resumed selling oil and gasoline to the airport sites, of which the subject station was one, as a jobber and, after that the plaintiff again starting operating the station through another route. The court reasoned that it would not allow a double recovery and thus limited plaintiff's damages to the period running from when it was illegally deprived of the station until it began to operate a gasoline business in connection with the airport a year later. The contract term had nothing to do with it. Thus the decision in this case is at odds

with that 8th Circuit case as well as with the 10th Circuit case.

The question is closer, however, with regard to the Lippo case and it is there that the theory of the district court in this case is met. For in Lippo there was, as here, a premature illegal termination during the contract term. However, Lippo managed to enjoin Mobil, stay in the station and operate it thereafter. Almost a year and a half later, when his contract term expired, Mobil then legitimately non-renewed his franchise. There was no question of a premature termination so complete that it destroyed the franchise relationship itself beyond repair at that initial stage as is true in the present case.

The district court in this case based its limitation of damages to the contract term on this principle, that a franchisor may terminate or non-renew legitimately

subsequently to a premature termination during the term that is illegal. However, this ignores the most significant difference between the facts in Lippo and those in this case, namely, that in this case Hoai was not able to enjoin Sun and stay in the station. He was given no opportunity to do so whatsoever. Instead Hoai, who was in the process of curing the default of having been ousted from his station so as not to be in it as required by the terms of his franchise, was deprived of his station by a private, voluntary act between Sun and Vo at the end of the Superior Court TRO issued August 29, 1986 which expired September 8, 1986. Had this private agreement not been made by Vo and Sun, entered as an order of the Superior Court and then enforced by Vo against Hoai, then Hoai would have been free to reenter and reoccupy his station just as he had done before. Indeed, with

Vo failing to follow on after the TRO with a full preliminary injunction hearing as the TRO judge had promised Hoai would occur,[16] Hoai would have been free to seek his own injunctive relief against Vo, such as his still outstanding motion to enforce the settlement agreement between himself and Vo to abide by the word of Ernie Peele, the Sun area manager, as to who was Sun's dealer at the location.

Thus, Lippo also fails to support the decision of the lower courts in this case. Because it found, without comment, a legitimate termination and nonrenewal of the franchise almost a year and a half after the initial illegal termination it implies that where the second termination is not legal, the principal limiting damages in

[16]As App. 195 et seq. show, Sun's in-house attorney Wagner was persuaded by Vo's counsel to enter the consent order so that Sun might avoid having to comply with the requirements of Rule 65 for a follow-on preliminary injunction hearing after obtaining a TRO.

Lippo to the contract term would not apply. Thus there is a conflict also between the present case and the 7th circuit in Lippo if there was no legitimate second termination or nonrenewal in the present instance.

In the present case Sun created the problem which it then used as its rationale for supposedly both terminating and nonrenewing Hoai at the end of the contract term, by which time Vo and not Hoai had been in charge of the station for over seven months, with Hoai unable to return to his station for fear of the consent order, which he took to the D.C. Court of Appeals only to have that court opine, after the contract term had expired, that the matter was moot. Thus, this situation is like that proscribed by the 9th Circuit in Pro Sales, Inc. v Texaco (CA9 1986) 792 F2d 1394, where Texaco reduced the credit of the fran-

chisee and then attempted to use the inevitable results of that action to attempt to justify terminating the dealer. This course of action was specifically anticipated and forbidden by Congress in the Act in 15 U.S.C. 2801 (13)(B) which defines "failure" (for which there may be termination or nonrenewal) not to include "any failure for a cause beyond the reasonable control of the franchisee. Here Sun, when it made the deal with Vo to enter into and enter in court the consent decree, placed any subsequent failure of the station beyond Hoai's control. Below Hoai supported this contention with local contract law concerning massive breaches, namely the D.C. "prevention doctrine" and Fowler v A & A Co. (DCCA 1970) 262 A2d 344, 348, n.6.

Thus the decision below here appears to conflict with the only real authority there is on a termination or nonrenewal

which destroys the entire franchise relationship. What is quite crucial and insidious about the present decision is that it robs the concept of franchise relationship as defined in 15 U.S.C. 2801 (2) of any meaning at all. After all, one could have sued for a wrongful termination such as this prior to the passage of the PMPA and obtained damages for the contract term. This is one reason why this Court in this instance, without letting the conflict between circuits develop further, take this case. It is akin to its supervisory power over the courts that is sometimes invoked in issuing a writ of mandamus.

Further, where, as here, a litigant in an emerging area of societal concern, in this case the problem of immigrants struggling with the would be mafias among their ranks, (not only the Vietnamese and other Asian immigrant populations come to mind,

but also the Russians) the supervision of this Court is called upon just as it was during the heighth of the struggle to end segregation. When Hoai began his quest to find a remedy for his wrongs and to right the harm done him by Vo, and ultimately by Sun and others who chose to join with Vo at the crucial moments, the idea that there were Vietnamese preying upon their fellows in the manner he alleged was subject to disbelief and scorn. He was, therefore, never allowed to go head to head with Vo or any of his other tormentors on the merits of his allegations, even as opposing counsel, and ultimately the courts themselves, were preventing him from doing so while asking where was his showing of that which he alleged ?

So that when Hoai sued Vo and Vo's colleagues (but not Sun) under the RICO laws in 1986 he was viewed with great skep-

ticism and the judge in the Eastern District who dismissed the case was openly indifferent to Hoai's allegations of threats of bodily harm and even murder. Such matters caused him to lose interest, he opined while dismissing the case because he found that the two businesses which Hoai alleged he was deprived of, the gas station in question here and another, food business, in Arlington, were taken pursuant to a single scheme and thus no pattern of racketeering activity was shown. This, as we have stated, was before the decision in H. J. inc.

As it turned out, the group that wished to prey upon Hoai and others in this instance, was successful in destroying Hoai's businesses though they may not have been as successful with others as they might have been had Hoai, through his efforts in the courts, not shone a light upon their activities, even though the

courts have been remarkably indifferent to his plight and reluctant to let him get to the merits of his cases. The representation that there is no substance that which he has not been allowed to show is bootstrapping of the most blatant sort.

Only in the interlocutory appeal in this case and his successful jury trial in this case, limited as it was, has he seen the justice system of his new homeland respond to his litigation attempts with anything approaching the promise held out to those who come here. As he had his counsel assert in asking for reconsideration below, when the communists shot his father for being a landlord, at least they gave him a lawyer, listened to his whole story and then shot him. Nothing equivalent to that grant of full process has happened here.

Here is a man who does not rely upon the politics of victimization but who seeks his own way and he finds the courts in-

sensitive to the righteous man who seeks to make his own way and who will stand up against members of his own ethnic group who do not adhere to the American laws. It is time that the concept of civil liberties was integrated with the general laws as applied to enhance individual rights and liberties rather than concepts of bloc politics and a collectivist mentality. There are over 207,000 service stations in America. It is the quintessential small business. No case is reported in which this Court has taken up the issues of the PMPA. This case illustrates just how badly in many instances courts have strayed from the Act's purpose. There are good policy reasons to take this case.

The jurisdiction of this Court to issue the writ of mandamus is sometimes exercised because its supervision is needed. Such is the case here. This case, as may

be seen from the above statement of it, is an unusual one, but that should not be, as it seems to have been below and in related cases, a reason for refusing to apply the law fully. The attitude toward Mr. Hoai and his complaints in this matter was amply illustrated in the opinion in the district court on exemplary damages: he got what the court chose to call a "handsome award" from the jury. The obvious implication is that he should go away satisfied. The law should not be a parceller out of begrudging awards as an entity deigning to give favors, it should be applied fully and fairly without fear of favor. Had Hoai not had a case he should have been the recipient of nothing. Having a case, however, he should have been allowed to present as fully within the confines of the law as the law allows. That did not happen, and the error involved in preventing it from happening

depends in significant part upon assertions of the law which reveal a split in the circuits.

The decision limiting the damages in this case was enabled by the parallel decision concerning tort type damages versus contract type damages and by the district court's decisions concerning estoppel and waiver. All of the district court decisions were affirmed without comment and a petition for rehearing along with a suggestion for rehearing en banc were also denied without comment.

Very few PMPA cases have reached the stage of awarding damages at all. It has on the whole not been a balancer as intended between the superior market power of the refiners and producers and distributors on the one hand and the lesser power of the dealers or franchisees on the other. Even fewer cases have reached the issue of measuring damage to the entire

business damaged, destroyed or taken away as opposed to a question of damages during a period of only a few months in which notice was untimely. But the cases which have reached that stage have taken a position on damages directly contrary to that taken in the present case.

Further, the position on damages in turn relates from the damage section (15 USC 2805) to the preemption question as addressed by 15 USC 2806. There is a split in the circuits on this last important point[17] which is in turn reflected in this case in the damages awarded. Though Sun here joined forces with a man who, with his colleagues, had threatened Hoai as Hoai had informed Sun and as Sun has acknowledged knowing. From that action certain consequences beyond normal lost profits could be expected to flow as a

[17]See "Pre-emptive Scope of §106(a) of Petroleum Marketing Practices Act (15 U.S.C. 2806(a))" 103 ALR Fed 698.

reasonable matter. Here the lower court cut off even special damages which would necessarily flow from the special circumstances, special damages still being a doctrine under D.C. contract law.

Here this was a further undermining of the central purpose of the Act. The phrase "actual damages" as used in 15 U.S.C. 2805 was chosen to embrace all damages other than exemplary damages by Congress. The lower court here, by tortuous reasoning spun its meaning to exclude all but straight contract damages for the contract term. Its limitation to the term of the contract was in part based upon this further spin in contradiction of congressional intent. Hoai's citation to the court of appeals of a D.C. case almost directly on point, Robinson v Sarisky (DCCA 1988) 535 A2d 901, was of no avail. Either the PMPA displaces all local law, including tort law where it overlaps il-

legal termination or nonrenewal under the Act or it does not. If it does not then Congress failed in what it intended to do and the door is open for a host of other claims and counts beyond the PMPA whenever an illegal termination or nonrenwal occurs. This is a point this Court should address.

Further, there appears to be conflict and confusion in the circuits on the application of the doctrines of estoppel and waiver, which are essentially local doctrines of state law and how they affect the questions of damages which arise under the PMPA. This confusion seems to have reached a peak in this case and to have directly affected the outcome in a way incompatible with the PMPA and its underlying purpose. It is hard to imagine how there could not be a waiver or estoppel where a party is encouraged to take back a business from the likes of Vo and his col-

leagues, does so at considerable risk and expenditure of time and resources, has the franchisor then switch sides to that of his tormentor and join with that tormentor in taking the very business he was urged to recover. Yet the district court here based its decision upon a finding that there was no estoppel or waiver here.

Finally, there is here a similar question on the point of the refusal to award exemplary damages and the refusal of them on a summary basis in the face of Hoai's crossing motion. Sunoco, in this case, brutally terminated Hoai's franchise in a manner unparalleled in the reported cases. It not only gave no notice of the termination, it displayed complete indifference to whether or not Hoai had any rights under 15 USC 2802 at all. It encouraged him to fight to get his station back from a man it understood from Hoai to have threatened him with bodily harm and murder

and to have acted in a manner imitative of the mafia.

When he did so and took action to retrieve his station from this individual, one Vo, Sun gave every appearance of standing behind Hoai as its franchisee. Yet when Hoai did retrieve possession of his station and, for his pains, was sued along with Sunoco in the Superior Court of the District of Columbia, Sun, which could have dismissed the suit as against itself at any time on a simple motion, instead, switched sides because Vo was able to obtain a 10 day Temprorary Restraining Order, and, for the purpose of avoiding notifying Hoai so as to not have to have with Vo a follow on preliminary injunction hearing where the impropriety of the TRO could have been exposed under Rule 65 requirements, made an agreement with Vo to give the station and franchise to Vo in lieu of Hoai for the duration of its term.

That this was ostensibly done to be "neutral" until the dispute between Vo and Hoai was over, is an irrelevant semantic game. It was not neutrality, it was switching sides in the middle of the struggle which it had encouraged Hoai to take on, and it was a betrayal of Hoai.[18] Sun waived its rights to stand on any ground other than backing Hoai when it encouraged him to reenter and retrieve his station from Vo. It was also estopped. Yet the lower court denied Hoai's requests for waiver and/or estoppel on this point and the appellate court silently affirmed.

By this action Sun illegally terminated Hoai in violation of the PMPA and did so in a fashion which prevented petitioner Hoai from ever being in a position to have

[18]See App. 195 et seq. for the accurate picture. The picture was muddied extensively by the district court's refusal to allow Hoai to depose attorney Wagner by phone after Sun sent him to Tulsa and by its refusal to allow a bench trial where attorney Forester would have been compelled to testify.

his contract of franchise renewed. The subsequent notices of termination and non-renewal for the end of the term of the franchise agreement which came later were addressed to Hoai but delivered to the premises which had been given Vo by Sun. They faulted Hoai for that which, once the premises and fuel supply were given to Vo, only Vo (as the choice of Sun) had any control over. They did not legitimately cure the deficiencies of the first illegal termination. They were instead self-serving attempts by Sun to limit its damages which were irrelevant in light of the damage already done by Sun and which attempted, under local contract law, to fault Hoai for that which had been created by Sun and the intruder Vo acting together, and to hold Hoai responsible for that, given the massive nature of the illegal termination constituting a breach of the contract of franchise, which he had no

further obligation to pursue, namely the honoring any further of the contract of franchise underlying and defining the franchise relationship. As such they were a cause to award exemplary damages, not a rationale for refusing them.

The way in which the holding on exemplary damages was rendered in this case illustrates that the lower courts, after a promising start in Gilderhus v Amoco Oil Co. (D Minn 1980) CCH Trade Cases 1980-81, Para 63,648 and 77,495 with regard to the use of the single word "wilfull" in an entirely different section of the Act, then have gone far astray from the purpose of the enactment of the exemplary damages provision, where the word "wilfull" was coupled intentionally with the word "disregard" and with the concept of disregard not only of the Act but of the rights of the franchisee thereunder. In following the decision of the Maryland district

court in Eden v Amoco Oil Co., Inc.. (D Md 1990) 741 FSupp 1192, a case where the issue of the meaning of the language as actually used, and particularly the coupling of the words and concepts was not treated, without questioning its flawed underlying premises, the lower courts to date have illustrated that they are following a wrong path, one at odds with an earlier decision of this Court [19]which did couple the concepts of wilfull and disregard, and that a split in the circuits is unlikely to develop in this area because there is now an almost universally wrong opinion based on Eden which no litigant will ever have an opportunity to bring to this Court on the basis of a split in the circuits. Therefore, since this represents an assault on an earlier opinion of this Court and a mistaken following of earlier precedents of this Court (as employed in Eden

[19]U.S. v Illinois Central (1938) 303 U.S. 239, 58 SCt 533, 82 Led2d 773

in connection with wilfull misbranding, a far different concept) where it does not apply, this Court should grant cert on this point and straighten the matter out. It is of sufficient importance to the central thrust of the PMPA with its intent to level the playing field between franchisors and franchisees, that it should be straightened out along with the questions concerning type of damage and length of the time for which damages may be granted. And, like the former questions, it too is effected by questions of waiver and estoppel.

CONCLUSION

For the reasons set out above the writ should be granted in this instance.

Respectfully submitted.

Laurence A. Elgin
8929 Sleaford Place
Annandale, Va. 22003
(202) 628-1114

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THANH VONG HOAI,
Petitioner,

SUN REFINING AND MARKETING COMPANY, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Supreme Court, U.S.
FILED

94 343 AUG 23 1994

OFFICE OF THE CLERK

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APPENDIX #1 OF 2 TO
Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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136 pp

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7133, et al. September Term, 1993
87cv02456

THANH VONG HOAI,
Appellant,

v.

FILED: MAR 09 1994
Ron Garvin, Clerk

Sun Refining and
Marketing Company, Inc.,
Appellee

On Appeal From the United States District Court for the District of Columbia Circuit

Before: Edwards, Buckley and Randolph, Circuit Judges.

J U D G M E N T

This cause came to be heard on appeal from the judgments of the District Court, and was briefed and argued by counsel. The issues have been accorded full consideration by the Court and occasion no need for a published opinion. See D.C. Cir. Rule 36(b). It is

ORDERED and ADJUDGED, by the Court, that the orders and accompanying memoranda of the District Court dated October 1,

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456-LFO
SUN REFINING AND MARKETING COMPANY,	)	
	)	
Defendant.	)	

ORDER

For the reasons stated in the accompanying Memorandum, it is this 25th day of October, 1991, hereby

ORDERED: that defendant's motion for summary judgment on the issue of exemplary damages should be and is hereby GRANTED; and it is further

ORDERED: that plaintiff's claim for exemplary damages is dismissed.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

notice recognized that the disappointing results were largely due to distractions caused by the dispute between plaintiff and Vo. [1] The notice also cited plaintiff's failure to comply with defendant's record keeping and inventory control program.

Plaintiff has not disputed these facts or proffered any [-2-] evidence of material facts which would justify a conclusion that the franchise survived the January 20 notice.

Plaintiff proffers that there was a conversation with defendant about a five-year relationship. Defendant disputes this assertion with sworn testimony. However, even if there were such a conversation, it is determined as a matter of law that the

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[1] Internal memoranda written contemporaneously to the decision to terminate evidence that these reasons stated in the January 20 letter were the genuine reasons for the termination there noticed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456-LFO
SUN REFINING AND MARKETING COMPANY,	)	
	)	
Defendant.	)	

MEMORANDUM

Plaintiff Thanh Vong Hoai brings this action against Sun Refining and Marketing Company ("Sunoco") under the Petroleum Marketing Practices Act ("the Act"), 15 U.S.C. § 2801 et seq., alleging that Sunoco terminated his Dealer Trial Franchise Agreement in violation of the Act. The matter is presently before the Court on cross-motions for summary judgment. For reasons stated below, defendant's motion will be denied, plaintiff's motion will be granted, and further proceedings will be

Sunoco branded motor fuel.[3] There is pending an unresolved dispute between Hoai and Vo as to which of them was entitled to possession and was in fact in possession from April through August 25, 1986. See Thanh Van Vo. v. Thanh Vong Hoai, No. 7075-86 (D.C. Sup. Ct.). It is Hoai's claim, as described by our Court of Appeals, that he was "threatened with murder and then 'driven out' of his gas station by Vo, with the help of other Vietnamese, a self-styled 'mafia'." Hoai v. Sun Refining and Marketing Co., Inc., 866 F.2d 1515, 1516 (D.C. Cir. 1989) (citation omitted and quotation marks removed). Whatever may be the ultimate resolution of the dispute between Vo and Hoai, it is undisputed that Sunoco supplied motor fuel to whomever was

---

[2] See Franchise Agreement, Part III (lease provisions); id. Part II, para. 5 (use of Sunoco branded fuel oils and Sunoco name).

("TRO"), effective for ten days, requiring Hoai and the Hemenways to discontinue the sale of any petroleum products or transacting any other business at the premises which Sunoco had leased to Hoai and to return possession and occupancy of the premises to Vo.[5] The TRO directed Sunoco to continue supplying Vo its branded petroleum products and to permit Vo to occupy and operate the station "under the same terms and conditions as existed" between him and Sunoco before August 25, 1986.[6]

On September 8, 1986, Sunoco and Vo (without the participation of Hoai) agreed to a Consent Order which recited the

---

[5] See Temporary Restraining Order, Thanh Van Vo v. Sun Refining and Marketing Co., No. 70757-86 (D.C. Sup. Ct. August 29, 1990) ("TRO") appended to Defendant's Statement, Exhibit 15.

[6] See id. at 2.

counsel were conspicuously absent from the mailing list. Thereafter, for several months, Sunoco continued to supply motor fuel to Vo at the Pennsylvania Avenue premises.[9] On January 22, 1987, Sunoco sent a written notice to Hoai at the Pennsylvania Avenue address advising him that "the operation of the station had not met with Sun[oco]'s expectations or standards. There has been a significant drop in the historical volume of gasoline sold" at [-4-] the Pennsylvania Avenue station.[10] Recognizing that this might be "due in large part to the distractions caused by the dispute" with Vo, Sunoco nevertheless advised Hoai that it had "elected to nonrenew [his] franchise

---

[9] See supra note 3.

[10] Letter from Harold J. Vaughn to Than Vong Hoai, January 22, 1987, appended to Defendant's Statement of Material Facts in Issue, Exhibit 14

and lease terminated and Sunoco discontinued supplying motor fuel to Vo or to the Pennsylvania Avenue premises.[14] It is undisputed that after August 29, 1986, when Hoai vacated the premises pursuant to the TRO, he never again occupied the premises which had been leased to him by [-5-] Sunoco or received any Sunoco branded motor fuel pursuant to his franchise agreement with Sunoco.

Meanwhile, on September 18, 1986, counsel for Hoai filed an appeal from the Consent Order to the District of Columbia Court of Appeals. On March 4, 1988, that court dismissed the appeal, and remanded the case to the Superior Court with the observation that the TRO and the Consent Order had expired by their own terms; the Court of Appeals decision did not purport

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[14] See Defendant's Statement at para. 15.

by the Act. [-6-]

A.

The franchise agreement is a general form contract, stating the terms and conditions on which Sunoco agreed to make available branded motor fuel to Hoai as a "Dealer" and under which Hoai as Dealer was required by Sunoco to operate his business. The agreement specifically provides that

> should Dealer fail to substantially comply with, or violate, any requirement imposed upon, or promise made by Dealer in this Dealer Franchise, Company may . . . terminate this Dealer Franchise.

See Franchise Agreement para. 17(d). In the event of termination, the agreement obligates Hoai to cease using Sunoco's branded identification and provides that Sunoco "shall repurchase" from Hoai all Sunoco's branded motor fuels at Hoai's cost. See id. para. 17(e).

As a Dealer named in the contract,

to notify their franchisees of an impending termination as a prerequisite to lawful termination. Generally, a franchisor must provide notice "not less than 90 days prior to the date on which such termination or nonrenewal takes effect." Id. § 2084(a)(2). The Act requires that the statutory notice

> (1) shall be in writing;
>
> (2) shall be posted by certified mail or personally delivered to the franchisee; and
>
> (3) shall contain -
>
> > (A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;
> >
> > (B) the date on which such termination takes effect; and
> >
> > (C) the summary statement [of franchisee rights under the Act prescribed by Energy Department regulations].

Id. § 2804(c). The Act also provides that where it would not be reasonable for a

based upon grounds specified in the Act, nor was it accompanied by the notice required by the Act. Sunoco contends that there was no termination at all. The Consent Order did not terminate the franchise, but rather recognized the continuing legal vitality of the franchise agreement by providing that Sunoco would resume supplying motor fuel to Hoai when and if the Vo-Hoai dispute was resolved by them, and Hoai came into possession of the premises.

A.

Courts have treated three elements as the essential components of the franchise agreement: "[T]he contract to use the refiner's trademark, the contract for the supply of motor fuel, [and] the lease of the premises." May-Som Gulf. Inc. v. Chevron U.S.A.. Inc., 869 F.2d 917, 922 (6th Ctr. 1989); see S. Rep. No. 731, 95th

> may not be circumvented by a termination or non-renewal of the real estate lease or motor fuel supply agreement which thereby renders the trademark license useless.

Senate Report at 29; 1978 U.S. Code Cong. & Adm. News at 888.

In light of these principles, Sunoco plainly terminated Hoai's franchise. Sunoco may have breached its lease to Hoai by permitting Vo to occupy the premises instead of Hoai. It certainly breached its agreement to supply motor fuel by supplying motor fuel to Vo instead of Hoai. Thie breach effectively terminated Hoai's franchise. This termination occurred at the latest on September 8, 1986 when, free from the compulsion of the TRO, Sunoco discontinued sale of motor fuel to Hoai and commenced (or resumed) supplying motor fuel to Vo at the premises leased by Sunoco to Hoai.

Sunoco argues that under the Consent

motor fuel to Hoai at the premises and imposed upon it an obligation to supply Vo there, the TRO expired on September 7, ending those court imposed duties of Sunoco. Sunoco was not compelled to enter into the September 8, 1986 Consent Order. As a consequence, in fact and in law, that consent order was an agreement between Sunoco and Vo. This construction is confirmed by our Court of Appeals' treatment of the Consent Order as an agreement. See Hoai v. Sun Refinina & Marketina Co., Inc., 866 F. 2d at 1519. Moreover, irrespective of whether the approval of the Superior Court Judge endowed the order with any greater authority than a mere agreement, the Consent Order could not have abridged Hoai's rights. Hoai was neither a party to it nor apprised of it before it was agreed upon between Vo and Sunoco and signed by

18, 1978 U.S. Code Cong. & Adm. News at 876. It may, indeed, be that his absence from the premises, through no fault of Sunoco, violated his franchise agreement and would therefore have justified termination of the franchise under 25 U.S.C. § 2802(2)(A), see supra 8, in September, 1986 or before, even though, as Hoai vociferously contends, his absence was coerced by Vo's violence or the threat of it.

However, Sunoco failed to provide Hoai with the notice required by the Act to effect a lawful termination. Nor is the Superior Court's temporary restraining order or the consent order a legally acceptable substitute for the statutory notice procedure. The application for TRO was sought, not by Sunoco, but by Vo, and Sunoco did not furnish Hoai with any notice with respect to the [-13-] Consent Order

franchise agreement with the intent of assigning the franchise to Vo, in violation of the franchise agreement. See Franchise Agreement, Part II para. 20(a)(6).[16] Sunoco does not cite any precedent for such a use of equitable estoppel. Moreover, assuming that such an equitable defense exists, it cannot prevail in the [-14-] face of the specific requirements of the Act. Under the Act, Sunoco had the ability to remedy such a violation of the Franchise Aqreement if it first gave Hoai statutory notice that it intended to terminate Hoai's franchise because of his alleged

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[16] Section 20 of the Franchise agreement contains various representations of the Dealer. One of them is that

> Dealer has no intention or plan, at the time of signing of this Dealer Franchise, to transfer or assign this Dealer Franchise or Dealer's business.

Franchise Agreement, Part II, para. 20(a)(6).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456-LFO
SUN REFINING AND	)	
MARKETING CO.	)	
Defendant.	)	

MEMORANDUM

An Order of October 31, 1990 found that defendant Sun Refining & Marketing Company ("Sunoco") had terminated Hoai's Sunoco franchise without the notice required under the Petroleum Marketing Practices Act (the "Act"), 15 U.S.C. § 1801, and accordingly awarded partial summary judgment to Hoai on the question of liability. An Order of February 28, 1991 considered two motions in limine from Sunoco concerning trial on the issue of actual damages. That Order denied the motions in part, granted them in part, and

A.

The Act provides that a franchisee who proves a violation of the Act "shall be entitled --

> (A) consistent with the Federal Rules of Civil Procedure, to actual damages:
>
> (B) in the case of such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802 or 2803 of this title, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and
>
> (C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor."

15 U.S.C. § 2805(d)(1). The Act also provides that "[t]he question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury." Id. § 2805(d)(2). It follows then that only evidence [-2-]

Hoai argues that the term actual damages has an established meaning at common law. In support of this contention, he cites eight cases involving claims of libel, personal injury, and even violation of the Equal Credit Opportunity Act, spanning most of this century, and decided by state supreme and appellate courts from South Carolina to Washington state. See Anderson v. United Finance Co., 666 F.2d 1274, 1277 (9th Cir. 1982); Arizona Copper Co. Burciaga, 20 Ariz. 85, 177 P. 29 (1918); Washer v. Bank of America Nat'l Trust & Savings Ass'n, 123 P.2d 575 (Cal. App. 1942); Winans v. Chapman, 104 Kan. 664, 180 P. 266 (1919); Stephens v. Lever Bros. Co., 155 S.W.2d 540 (Mo. App. 1941); Oliver v. Columbia. N. & L. R. Co., 65 S.C. 1, 43 S.E. 307 [-3-] (1902); Ott v. Press Pub. Co., 40 Wash. 308, 82 P. 403 (1905). These cases note that actual damages are

clear definition for actual damages the nature of damages recoverable under the Act should be drawn from the common law or statutory actions it replaces. This argument is eminently reasonable. The Act was designed to prevent franchisors from exploiting their superior bargaining power by, for example, "suddenly terminating a business for which the franchisee has worked long and hard to develop good will." Brach v. Amoco Oil Co., 677 F.2d 1213, 1220 (7th Cir. 1982) (citing 123 Cong. Rec 10386 (1977) (remarks of [-4-] Rep. Mikva)). Therefore, "[a]s remedial legislation, the Act must be given a liberal construction consistent with its overriding purpose to protect franchisees." Id. at 1221 (citations omitted). It follows that the Act should not be construed in such a way as to restrict the damages available to a franchisee for an improper termination.

2802), by imposing notice and other procedural requirements on authorized terminations (id. 2804), and by providing improperly terminated franchisees with remedies not normally available under state law such as injunctive relief (5 U.S.C. § 2805(b)), exemplary damages, (id. § 2805(d)(1)(B)), and attorney's fees, (id. § 2805(d)(1)(C)). In this sense, the Act acts much like the [-5-] Uniform Commercial Code: It introduces standardized, and in this case required, terms into contracts between franchisors and franchisees.

The Act does not, however, impose any fiduciary duty upon franchisors requiring them to act in the best interests of their franchisees. Instead, it leaves "intact the franchisor's legitimate freedom to choose with whom it will deal," Lewis v. Exxon Corp., 716 F.2d 1398, 1399 (D.C. Cir. 1983), and it largely preserves a

2802(c). The only restriction on the franchisor's pursuit of its own self-interest is that its justification for termination must be authorized by the Act and, in terminating a franchisee, it must follow the procedures described in the Act. As a consequence, [-6-] the relationship between franchisor and franchisor remains primarily a contractual relationship.

Implicitly recognizing the contractual nature of disputes under the Act, the few reported decisions discussing damages have allowed franchisees to recover for lost profits. See Lippo v. Mobil Oil Corp., 776 F.2d 706, 716 - 18 (7th Cir. 1985); Thompson v. Kerr-McGee Refining Corp., 660 F.2d 1380, 1388 (10th Cir. 1981), cert. denied, 455 U.S. 1019 (1982); Midwest Petroleum Co. v. American Petrofing Marketing, Inc., 644 F.Supp. 1067, 1070 (E.D. Mo. 1986). Specifically, these cases

actual damages phase of the litigation he should also recover actual damages in tort. His theory is that the Act "forbids the franchisee who is terminated or nonrenewed from [-7-] bringing an action under any statutes or common law which allowed, prior to its enactment, the franchisee to sue the franchisor in the state court under common law or statutory causes of action." Plaintiff's Motion for Alternation and Amendment of Judgment Pursuant to Rule 59 at 10. He then reasons that his claim under the Act should "subsume . . . and incorporate" all the damage he could have recovered if he had pleaded and proved the allegedly preempted tort claims. Id. at 10. Thus, Hoai seeks the damages he could have recovered had he proven claims for abuse of process, wrongful eviction, intentional infliction of emotional distress, conspiracy to interfere with contract,

termination or non-renewal of petroleum franchises. Rather it [-8-] preempts only state [actions] as to grounds for, procedures for, and notification requirements with respect to termination and non-renewal." Bellmore v. Mobil Oil Corp., 783 F.2d 300, 304 (2d Cir. 1986) (footnote omitted). None of the tort claims enumerated by Hoai have anything to do with the "grounds for, procedures for, and notification requirements with respect to termination and non-renewal." Id. at 304. Nor do they in any way "conflict with Congress's objective of establishing 'a single, uniform set of rules governing the grounds for termination and non-renewal of motor fuel marketing franchises."' Barnes v. Gulf Oil Corp., 795 F.2d 358, 364 (4th Cir. 1986) (quoting Senate Report at 19). As a consequence, the Act's preemption clause does not bar a terminated franchisee

which might be recoverable. In any event, it would be unfair at this late stage in the proceedings to allow Hoai to amend his complaint more than three years after the original filing to include such claims because Sunoco had no notice of the claims for actual damages that Hoai now attempts to bring. See Fed. R. Civ. P. 15(a) (noting that leave of court to amend should be "freely given when justice so requires") (emphasis added).

C.

In sum, because the relationship between franchisor and franchisee is basically contractual and because the Act does not fundamentally change that relationship, it follows that actual damages under the Act should subsume damages available under contract law. By contrast, because the Act does not bar plaintiffs like Hoai from bringing tort

to articulate those theories. As a consequence, it was not possible in the Order of February 28, 1991, nor is it possible now, to rule definitively upon Sunoco's motion in limine. This is neither surprising nor unfortunate: Motions in limine are most naturally brought just before or at trial. See. e.g., Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708, 712 (6th Cir. 1975), cert. denied, 423 U.S. 987 (1975). Nevertheless, if only to clarify the basis of the Order of February 28, 1991 and to help structure discovery, some points can and should be made here.

A.

Hoai indicates at several points that he plans to present evidence concerning the embarrassment, the pain and the emotional suffering that Sunoco's termination of his franchise has caused him. Such injuries are not compensable under the Act.

for the delivery of messages concerning death." Id. § 353, comment a. A franchise contract has none of the personal elements that are involved in these contracts and that make it particularly likely to a reasonable person that a breach will cause serious emotional disturbance. Finally, a reasonable person would not have seen Sunoco's manner of breaching its obligations towards Hoai to be particularly likely to result in serious emotional disturbance. One would not have expected Sunoco's actions to surprise Hoai's expectations: Sunoco merely continued supplying Vo with gasoline under the same terms as the previous temporary restraining order. Moreover, although Hoai may have felt betrayed by Sunoco's actions, a reasonable person would not have foreseen any likelihood of serious emotional disturbance because Sunoco had no fiduciary

duty toward Hoai and was merely following its own interests. Accordingly, under normal contract law, Hoai would not be able to recover damages for emotional disturbance. [-12-]

Moreover, it is not clear that Congress meant to allow plaintiffs to recover damages fox emotional disturbance in the actual damages phase. As stated above, damages for emotional disturbance are rarely awarded. More fundamentally, the Act removes the issue of exemplary damages from the jury. See 15 U.S.C. § 2805(d)(2). This provision apparently evidences a desire to remove emotional, potentially inflammatory testimony from before the jury. Evidence of emotional disturbance is clearly inflammatory. Accordingly, it would appear that under the Act damages for emotional disturbance may only be recovered in the exemplary damages phase.

B.

More generally, Hoai appears to contend that he should recover for damages proximately caused by Sunoco's actions. If Sunoco had committed a tort, proximate cause would be the proper test for damages. The purpose of damages in tort is to "place the injured person as nearly as possible in the condition he would have occupied if the wrong had not occurred." H. McCormack, Handbook on Damages 562 (1935). By contrast, "damages for breach of contract should place the plaintiff in the position he would have been in if the contract had been fulfilled." Id. The proper test for such damages is whether the plaintiff's loss "was foreseeable as a probable result of a breach." Restatement (Second) of Contracts, § 351(2); see also id. § 351(1) ("Damages are not recoverable for loss that the party in breach did not [-13-] have

reason to foresee as a probable result of the breach when the contract was made."). Accordingly, in order to establish the relevance of any evidence of damage, Hoai must present evidence that those damages were foreseeable at the time the parties entered into the franchise relationship. See Fed. R. Evid. 104(b).

Hoai also argues that he should be able to seek "special" damages. Special or consequential damages are available for losses that result from "special circumstances, beyond the ordinary course of events, that the party in breach had reason to know." Restatement (Second) § 351(2)(b). They are really a special category of contractual damages. General damages are those damages which flow naturally from a breach so that a reasonable person would foresee them without any special knowledge of the

plaintiff's circumstances. Special damages are unusual damages that a reasonable person would not see without such knowledge. Because special damages are normally recoverable in contract actions, there is little reason to doubt that special damages may be awarded under the Act -- provided, of course, that Hoai can prove that Sunoco had reason to know of the special circumstances making that damage foreseeable before the contract was made.

C.

Finally, Hoai contends that the Order of February 28, 1991 misconstrued the time frame during which damages may be recovered [-14-] under the Act. The Order stated in relevant part:

> Defendant has moved in limine for an order which would require damages to be measured by the profits earned at the Sun station located at 2305 Pennsylvania Avenue from September 8,

> 1986 to April 27, 1987. The proof of damages so measured will be so limited unless and until the plaintiff has evidence that the franchise would have extended beyond April 27, 1987 but for the "termination" on September 8, 1986. However, plaintiff shall be permitted discovery with respect to any evidence or leads to evidence which would support a demonstration that the franchise and, hence plaintiff's profits (if any), would have extended beyond April 27, 1987. If he discovers such evidence, he may move for leave of the Magistrate Judge to seek further discovery with respect to profits of the station beyond that date.

Order of February 28, 1991 para. 1. Hoai argues that this ruling artificially limits the damages that may be recovered under the Act to the period of the franchise contract between Hoai and Sunoco. This criticism is misplaced.

It is true that the franchise contract expired on April 27, 1987. [sic: "Sunoco terminated Hoai on September 8, 1986 without notice in violation of the Act", Oberdorfer, J., in his memorandum of Oct.

1, 1990, part D] It is also true that the Act prohibits franchisors not only from terminating franchisees, but also from failing to renew them without sufficient cause, see 15 U.S.C. § 2802, and that terminated franchisees may recover damages for lost profits beyond the term of the last contract. See, e.g., Thompson v. Kerr-McGee Refining Corp., 660 F.2d at 1388. It is not, however, true that the Order of February 28, 1991 determined that under the Act franchisees may only recover damages for the period covered by the latest franchise contract. The Order clearly allows Hoai, as a matter of law, to prove damages beyond the [-15-] contract period -- provided that he present evidence that his franchise would not have been terminated by then.

This is an evidentiary holding, not an interpretation of the Act. The Federal

Rules of Evidence require that "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Fed. R. Evid. 104(b). The Order simply recognizes Hoai has failed so far to establish a foundation for evidence of damage beyond April 27, 1987. Because, however, Hoai apparently fails to grasp the basis of this ruling, it will be useful to set it out here.

The as-yet undisputed facts demonstrate that Sunoco desired to extricate itself from the conflict between Hoai and Vo. On September 8, 1986, it tried to remove itself as a party to that conflict by agreeing to supply motor fuel to Vo until the conflict was resolved. See Memorandum of October 31, 1990 at 3 - 4.

Later it informed Hoai of its intention to terminate his franchise, which it thought it did on April 27, 1987. See id. at 4 - 5. Hoai has presented no evidence suggesting that Sunoco would have continued him as a franchisee. Accordingly, it appears at this point to be undisputed that Sunoco wanted to terminate Hoai by April 27, 1987 at the latest.

It also appears that Sunoco had proper grounds for doing so. In the letters Sunoco sent to Hoai, it pointed to Hoai's failure to perform up to Sunoco's expectations and to his failure to comply with the record keeping provisions of the franchise contract as grounds for termination. See id. Either of these justifications would have been sufficient to permit termination under the Act. See 15 U.S.C. § 2802(b)(1)(2). Indeed, Sunoco could have terminated Hoai on September 8, 1986 for

failing to manage the station personally for more than seven consecutive days if it had given him proper notice. See Memorandum of October 31, 1991 at 13; 15 U.S.C. § 2802(c)(9)(A). It chose, for reasons that are not apparent, not to do so until April 27, 1987. Nevertheless, all the evidence presented so far suggests that it would have terminated his franchise by that date.

Accordingly, the Order of February 18, 1991 informed Hoai that he would not be able to present evidence of damage incurred past April 27, 1987 unless and until he established a foundation for that evidence by presenting evidence that "but for" the termination on September 8, 1986 his franchise would have continued past April 27, 1987.

III.

Hoai has also moved to certify various questions relating to the Order of February

8, 1991. Interlocutory appeals are, however, not favored. They are allowed only if an order "involves a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). This memorandum demonstrates that most of Hoai's contentions were based upon a misunderstanding of the Order. The [-17-] one remaining contention is whether Hoai can recover damages in tort. Since there does not appear to be "substantial ground" for that contention, an interlocutory appeal on that issue would be inappropriate.

IV.

Accordingly, the accompanying order will deny plaintiff's motion for alteration and amendment of the Order of February 28, 1991 as well as his motion for certification.

DATE:
May 1, 1991 /s/ Louis F. Oberdorfer
United States District Judge
[-18-]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456-LFO
SUN REFINING AND	)	
MARKETING CO.	)	
Defendant.	)	

MEMORANDUM AND ORDER

On May 10, 1991, plaintiff Hoai filed a motion for partial summary judgment. Primarily, Hoai argues that the letters sent by defendant Sun Oil on March 2, 1987 and January 22, 1987 are not relevant to the issue of damages because they "are not relevant to any expectation which Sun by its words and acts raised in Hoai before the actual termination . . . ." Plaintiff's Motion for Summary Judgment at 5. This is incorrect. Under the franchise agreement between the parties, Hoai could reasonably expect to continue the franchise in the

absent of sufficient cause to terminate his franchise. The letters of January 22, 1987 and March 2, 1987 indicate that there was such cause. See Memorandum of May 2, 1991, at 16. letters are clearly relevant to the issue of damages.

Hoai now suggests that Sun Oil is estopped from raising such concerns because it, not Hoai, is responsible for the poor performance of the gas station. Specifically, "the termination of Hoai and the giving of his station to Vo by Sun prevented Hoai from having any effect whatsoever on the performance of the Thus, the [-1-] station." See Plaintiff's Motion for Partial Summary Judgment at 10 - 11. There is, however, no evidence that Sun Oil "gave" the station to Vo -- the temporary restraining order issued by the Superior Court did that -- or that Sun Oil in any way prevented Hoai from recovering his

station. Moreover, Sun Oil was under no duty to aid Hoai. See Memorandum of May 2, 1991 at 6 - 7. Thus, as intimated in several previous orders from this Court, the notices of nonrenewal sent by Sun Oil in 1987 are relevant to the issue of damages.

Hoai also seeks to establish certain facts as undisputed. Although his original motion for summary judgment was not accompanied by a proper statement of material facts under Local Rule 108(h), he has now filed such a statement. Defendant Sun Oil, however, has not clearly indicated which facts it claims are in dispute. Accordingly, this Order will require defendant to file a statement of material facts in genuine issue. That statement should be in numbered paragraphs corresponding the numbered paragraphs in plaintiff's statement, and in each numbered

paragraph defendant shall indicate whether there is a genuine issue as to the facts identified by plaintiff in the corresponding paragraph and, if there is, the evidence in the record raising that issue.

Accordingly, it is this 3rd day of June, 1991, hereby

ORDERED: that Plaintiff's Motion for Partial Summary Judgment on Certain Questions of Damages should be, and is hereby, denied; and it is further [-2-]

ORDERED: that defendant shall file a statement of material facts in genuine issue on or before June 14, 1991.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456-LFO
SUN REFINING AND	)	
MARKETING CO.	)	
Defendant.	)	

MEMORANDUM

I.

An October 1, 1990 Order granted plaintiff a partial summary judgment that defendant Sun Refining and Marketing Company, Inc. ("Sun") terminated its franchise agreement with Hoai without the notice required by the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, et seq. (1988) ("the PMPA") when, pursuant to a Superior Court Consent Order it supplied its petroleum products to Thanh Van Vo instead of the plaintiff at the service station at 2305 Pennsylvania Avenue, S.E.

which it had leased to plaintiff. On October 11, 1991, after a five day trial, a jury awarded plaintiff $65,000.00 in compensatory damages.

Plaintiff's Complaint claimed $15,000,000.00 in exemplary damages.[1] On July 11, 1991, defendant filed a Motion for Summary Judgment on the Issue of Exemplary Damages and plaintiff responded [-1-] with an Opposition to Summary Judgment on the Issue of Exemplary Damages on August 5, 1991. Following the jury verdict on October 11, 1991, the Court offered counsel the opportunity to argue the motion at that time; plaintiff indicated that he was not prepared. Accordingly, the Court stated from the Bench that the Motion was submitted on the

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[1] On October 11, 1991, plaintiff filed a supplemental Motion for Summary Judgment on Exemplary Damages reducing the exemplary damage claim to $650,000.00.

papers with the benefit of the evidence adduced at the trial on compensatory damages.

II.

The Petroleum Marketing Practices Act provides that a franchisee is entitled to exemplary damages if the franchisor acted in "willful disregard of the requirements [of the PMPA] or the rights of the franchisee" and such damages are to be granted only "where appropriate." § 2805(d)(1)(B) (emphasis added). Exemplary damages are a responsibility of courts without a jury. The Court in Eden v. Amoco Oil Co., 741 F. Supp. 1192 (D. Md. 1990) held that the determination of "willful disregard" in the context of the PMPA

> "describes conduct that is pursued with a consciousness of wrongdoing or with a considered disregard to whether it violates the Act. It requires more than deliberate conduct that, in fact, violates the Act, so that an aspect of guilty knowledge or

> imputed guilty knowledge is required. As used in the Act, however, willfulness does not encompass a requirement of showing maliciousness in motive.

Eden 741 F. Supp. at 1195. See also Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985). While the Eden Court in analyzing the PMPA relied upon the decisions in Thurston and McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988) that determined "willfulness" in connection with the Age Discrimination in Employment Act, and the Fair Labor Standards Act respectively, rather than the PMPA, Eden's rationale is useful with regard to the burden placed on the plaintiff to prove a deliberate or willful act. In McLaughlin, the Court specifically examined the term "willful" as a qualifier stating that:

> In common usage the word "willful" is considered synonymous with such words as "voluntary," "deliberate," and "intentional." The work "willful" is widely used in the

> law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The standard of willfulness that was adopted in Thurston-- that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute--is surely a fair reading of the plain language of the [Fair Labor Standards Act].

Id. at 133, (citation omitted). Therefore, in the context of the PMPA it is reasonable to use the term "willful" to indicate an act that is not merely negligent but can be said to have been taken with deliberate or intentional disregard to the requirements of the statute.

When the Courts have considered the term "willful disregard" with respect to the PMPA, they have been reticent to award exemplary damages absent a clear and affirmative showing of a deliberate and intentional act on the part of the

defendant. In Midwest Petroleum Co. v. American Petrofina Mktg. Inc., 644 F. Supp. 1067 (E.D. Mo. 1986) the Court concluded that

> [I]n light of the paucity of case law interpreting the PMPA and the difficulty of the issues in this case, the Court cannot say that defendant's actions manifested a willful disregard' of the requirements of the PMPA or plaintiff's rights thereunder such that exemplary damages would be appropriate. Accordingly, plaintiff's request for exemplary damages is denied."

644 F. Supp. at 1072. See also Noe v. Mobil Oil Corp., 503 F. [-3-] Supp. 213 (E.D. Mo. 1980) (holding that absent a showing of "willful disregard" franchisee was not entitled to punitive damages under the PMPA for an "alleged wrongful attempt by oil corporation to terminate trial franchise." Id. at 214.); Clark v. Mobil Oil Corp., 496 F. Supp. 132 (E.D. Mo. 1980) (where a plaintiff continued to operate a

gasoline station throughout the litigation and sustained no actual damages other than nominal ones the court noted that a technical violation of the PMPA was not in "willful disregard" thereof and did not award punitive damages).

The plaintiff in this case has not made such a clear and affirmative showing of the willful disregard that would justify an award of exemplary damages. The de facto termination effected September 8, 1986 (unlike the final termination of April 27, 1987, pursuant to the formal notice dated January 22, 1987) was not something initiated by defendant. Sun continued to deliver its products to the Pennsylvania Avenue station and to Hoai as long as he was present in the station. On about May 15, 1986, Thanh Van Vo took over possession of the station premises from Hoai without any participation by Sun.

When, for reasons beyond Sun's control, Vo occupied the station, Sun continued to deliver its products there. But Hoai, through no fault of Sun, was not operating a gasoline station during that interim period and, therefore, Sun could not have continued to deliver their petroleum products to Hoai there or at any other location. In fact, on August 26, 1986, when Hoai returned to the premises, and Vo had left, Sun continued to deliver their petroleum products to the Pennsylvania Avenue [-4-] station.

It is undisputed that, but for the intervention of the Superior Court's August 29, 1986 Temporary Restraining Order displacing Hoai, restoring Vo to possession, and requiring Sun to continue delivery to the station with Vo in possession, Hoai would have remained in possession of the premises, there to

receive Sun's petroleum products. During the ten day period of the Temporary Restraining Order's validity, Sun, consulting with and acting through counsel, entered into a Consent Order, approved by the Superior Court, that

> Plaintiff [Vo] and Sun . . . agreed that the terms and conditions of the Temporary Restraining Order should be continued with respect to Plaintiff and Defendant Sun . until March 31, 1987 or the prior resolution of the dispute between Plaintiff and Defendant Thanh Vong Hoai over rights to operate the . . . station . . .

There is direct and undisputed evidence in the form of the deposition of Joseph D. Zulli, that at the time of the Consent Order, Sun was unaware that by entering into and abiding by that agreement, without formal statutory notice to Hoai, it terminated plaintiff's franchise, a fact first recognized by Sun when, on October 1, 1990 this Court so ruled. See Deposition of Joseph Dennis Zulli, Esq., Chief

Counsel for Branded Marketing and Lubes for Sun, June 17, 1991 at 56. Moreover, there is no evidence that Sun was specifically attempting to terminate its relationship with Hoai. Conversely, the Consent Order establishes, by a negative pregnant, that, if and when the dispute about possession between Hoai and Vo was resolved in favor of Hoai, Sun would continue to provide its products to the station occupied by Hoai during the [-5-] remaining term of its franchise agreement with him.

It is manifest from this voluminous record that Sun's lawyers, focusing on the Superior Court proceeding, and Sun, relying on its lawyers, disregarded the PMPA.[2] But there is no showing that

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[2] See Affidavits of Jeffrey W. Wagner and David C. Roseman, and excepts from the depositions of Harold J. Vaughn and Joseph D. Zulli, Esq.; Defendant's

either Sun or its lawyers willfully or recklessly, as distinguished from carelessly, disregarded the notice and other requirements of the PMPA when Sun agreed to and subsequently complied with the Consent Order.

The undisputed facts preclude a finding that Sun acted "with a consciousness of wrongdoing or with a considered disregard to whether it violated the Act." Eden, 741 F. Supp. 1192 (D. Md. 1990). As this Court ruled, Sun's "participation in the Consent Order violated the notice requirement of the PMPA and a jury has awarded plaintiff a handsome damage award of $65,000.00 in recognition of that fact. It may be, as a matter of local law, that the Consent Order was not

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Motion for Summary Judgment on the Issue of Exemplary Damages filed June 11, 1991 (attachments).

enforceable by the contempt power of the Superior Court. However, that fact would not satisfy plaintiff's obligation to come forward with evidence of willful disregard of the PMPA by Sun when, in the unique circumstances of this case, Sun failed to provide a federal statutory notice before agreeing to the Consent Order proposed to it by Vo's counsel. Moreover, Sun had no fiduciary or other duty to resolve the dispute between Hoai and Vo. Hoai, himself, failed to effectively pursue [-6-] simple local law remedies which could have resolved that dispute. Moreover, Sun demonstrated that, relying on legal advice, it did not appreciate the illegality of its participation in the September 8, 1986 Consent Order. As the Court in Eden noted, "[S]eeking a lawyer's advice does not, immunize one's action. But it is evidence to be considered in determining whether a

decision was made in willful disregard of statutory obligations." Eden 741 F. Supp. at 1196; see also Thurston, 469 U.S. at 129.

Sun's actions show no considered disregard of the PMPA but rather a practical business judgment in a difficult situation created by others. Sun relied on legal advice that turned out to be wrong. But Sun's conduct is not punishment the "appropriate" recourse. so egregious as to make The circumstances in this case are so unique and the role of Sun so passive that it would not be "appropriate" to impose sanctions either as an example or as a deterrent to others.

III.

On the basis of the entire record, including plaintiff's October 11, 1991 filing, an accompanying Order will grant defendant's Motion for Summary Judgment and

dismiss plaintiff's claim for exemplary damages.

Date: Oct. 25, 1991

/s/ Louis F. Oberdorfer
United States
District Judge

[-7-]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456-LFO
SUN REFINING AND MARKETING CO. INC.,	)	
Defendant.	)	

MEMORANDUM AND ORDER

Summary judgment is hereby granted to defendant limiting damages to be awarded to plaintiff to the period ending April 27, 1987. The undisputed material facts establish that:

1. The original franchise relationship between plaintiff and Sun was for one year ending March 31, 1987.

2. On January 20, 1987, defendant delivered to plaintiff a notice of intent to terminate the franchise relationshp because sales were below the volume historically sold at that station. The

notice recognized that the disappointing results were largely due to distractions caused by the dispute between plaintiff and Vo.[1] The notice also cited plaintiff's failure to comply with defendant's record keeping and inventory control program.

Plaintiff has not disputed these facts or proffered any [-1-] evidence of material facts which would justify a conclusion that the franchise survived the January 20 notice. [sic: Oberdorfer, J., "Sunoco terminated (the franchise of) Hoai on September 8, 1986 without notice in violation of the Act." Memorandum of Oct. 1, 1990, of Oberdorfer, J.]

Plaintiff proffers that there was a

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[1] Internal memoranda written contemporaneously to the decision to terminate evidence that these reasons stated in the January 20 letter were the genuine reasons for the termination there noticed.

conversation with defendant about a five-year relationship. Defendant disputes this assertion with sworn testimony. However, even if there were such a conversation, it is determined as a matter of law that the written agreement between the parties for a one year trial relationship would preclude admission of testimony about a conversation about a five year term. Moreover, the trial relationship was terminated by a timely written notice (5 U.S.C. § 2803). Thus, the letter termination notice of January 20, 1987, effectively terminated any contract or franchise relationship which might have been formed by the alleged convervation.

Accordingly, for reasons stated in a Memorandum filed October 1, 1990, the defendant's Motion on the Limitation of Damages should be, and is hereby, GRANTED.

Date: /s/ Louis F. Oberdorfer
Sept. 16, 1991 UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456-LFO
SUN REFINING AND MARKETING CO.,	)	
	)	
Defendant.	)	

ORDER

For the reasons stated in the accompanying Memorandum, plaintiff's motion for summary judgment should be granted and defendant's cross-motion denied. Because of this disposition, many of the motions filed in this case are now moot. Accordingly, it is this 1st day of October, 1990, hereby

ORDERED: that defendant's cross-motion for summary judgment (Docket No. 94), should be, and is hereby, DENIED; and it is further

ORDERED: that plaintiff's motion for summary judgment (Docket No. 75), and plaintiff's renewal and expansion of his summary judgment motion (Jan. 12, 1990), should be, and are hereby, GRANTED as to the question of defendant's liability under the Petroleum Marketing Practices Act; and it is further

ORDERED: that plaintiff's motion for partial summary judgment on statute of limitations claims (Docket No. 134) has been conceded and is therefore DENIED AS MOOT: and it is further [-1-]

ORDERED: that plaintiff's motion for enforcement of waiver by defendant (Docket No. 153) is also DENIED AS MOOT; and it is further

ORDERED: that plaintiff's motion for interpretation of ambiguity against the defendant (Docket No. 156) is DENIED AS MOOT; and it is further

ORDERED: that plaintiff's motion under Weinberger v. Scully (Docket No. 155) is DENIED AS MOOT; and it is further

ORDERED: that plaintiff's motion to preclude estoppel claims (Docket No. 158) is DENIED AS MOOT; and it is further

ORDERED: that plaintiff's motion for, inter alia, additional discovery (Docket No. 112) is DENIED AS MOOT; and it is further

ORDERED: that counsel shall attend a status conference on October 17, 1990 at 9:15 a.m.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

[-2-]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456-LFO
SUN REFINING AND MARKETING CO.,	)	
	)	
Defendant.	)	

NOTICE

On May 20, 1991, defendant informed the Court that it had not been provided with a description of the pretrial statement required by Order of March 18, 1991. That description is set forth below:

(A) The Pretrial Statement of each party shall include as separately titled and numbered sections:

(i) a statement of the case;

(ii) a statement of claims made by the Party:

(iii) a statement of defenses raised by the parties;

(iv) a schedule of witnesses to be

called by the party:

(v) a list of exhibits to be offered in evidence by the party;

(vi) a designation of depositions, or portions thereof, to be offered in evidence by the party;

(vii) an itemization of damages the party seeks to recover: and

(viii) a request for other relief sought by the party. [-1-]

(B) The statement of the case shall set forth a brief description of the nature of the case, the identities of the parties, and the basis of the Court's jurisdiction.

(C) The statement of claims shall set forth each claim a party has against any other party (including counter-, cross-, and third-party claims), and the party or parties against whom the claim is made.

(D) The statement of defenses shall set forth each d_fense a party interposes to a claim asserted against it by any other party, including defenses raised by way of general denial, without regard to which party has the burden of persuasion.

(E) The schedule of witnesses shall set forth the full names of all witnesses the party intends to call if not earlier called by another party; a brief description of the testimony to be elicited from the witness; and an estimate of the time the party will take in eliciting such testimony. Expert witnesses shall be designated by an asterisk. A party need not list any witness from whom it expects to elicit testimony only by way of cross-examination.

No objection shall be allowed to a witness or to testimony first disclosed in a party's Pretrial Statement unless the party objecting has unsuccessfully sought to learn the identity of the witness or the substance of the testimony by discovery, and the court or magistrate finds the information to have been wrongfully withheld. [-2-]

(F) The list of exhibits shall set forth a description of each exhibit the party intends to offer in evidence (other than those created at trial). Exhibits shall be listed by title and date. Exhibits will be presumed to be authentic unless objection to their authenticity is made at or before the final Pretrial Conference and the objection is sustained.

(G) The designation of depositions shall identify each deposition or portion thereof (by page and line numbers) the party intends to offer in evidence. Any cross-designation sought by any other party pursuant to Rule 106, Federal Rules of Evidence, must be made at or before the final Pretrial Conference.

(H) The itemization of damages shall set forth separately each element of damages, and the monetary amount thereof, the party claims to be entitled to recover

of any other party, including prejudgment interest, punitive damages and attorneys' fees. No monetary amount need be set forth for elements of intangible damage (e.g., pain and suffering, mental anguish, or loss of consortium).

(I) The request for other relief shall set forth all relief, other than judgment for a sum of money, the party claims to be entitled to receive against any other party.

(J) To the extent possible, the parties shall submit stipulations of fact agreed upon or proposed by the parties.

(K) In nonjury cases, each party shall submit proposed findings of fact and conclusions of law.

(L) If either party has demanded a trial by jury, each shall attach as appendices to the Pretrial Statement:

(i) A proposed list of questions to be

asked of the jury panel by the Court in voir dire examination.

(ii) A preliminary set of proposed instructions to the jury which identify relevant D.C. Bar form book instructions and the authorities relied upon for any special instructions proposed. A xeroxed copy of all requested jury instructions (as distinguished from a mere list of standardized instructions) shall be submitted to the Court.

(iii) A proposed verdict form for a special verdict requested.

May 20. 1991 /s/ Louis F. Oberdorfer
UNITED STATES
DISTRICT JUDGE

[-4-]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(CIVIL DIVISION)

THANH VONG HOAI, Plaintiff	[FILED:6-28-91]
vs.	CA No.
SUN REFINING AND MARKETING CO.,	87-2456 LFO/PJA
Defendant	

Supplemental Pretrial Order

A Memorandum of October 1, 1991 found, based upon the undisputed facts, that defendant Sun Refining and Marketing Company ("Sun Oil") had violated the Petroleum Marketing Practices Act, 15 U.S.C. Section 2801 et seq., by entering into a consent order with Thanh Van Vo on September 8, 1986. Accordingly, an accompanying order entered partial summary judgment in favor of plaintiff Hoai and scheduled further proceedings to determine what damages were due to him. On June 24, 1991, the parties attended a pretrial conference to schedule further proceedings,

to resolve outstanding disputes, and to plan the trial on damages. This order memorializes the rulings in that conference.

1. Trial shall commence on October 7, 1991, at 10:00 a.m. Trial on actual damages will be before the jury. Trial on the issue of exemplary damages, if necessary, will be conducted separately before the Court.

2. No deviations from this order will be permitted unless the affected party specifically requests amendments and alterations to this order. Those requests may be made on or before September 9, [-2-] 1991 and will be considered at a conference on September 16, 1991 at 1:45 p.m. Subsequent requests for altering this order will not be considered.

3. Hoai has indicated in his pretrial statement that he intends to present

evidence of damages beyond April 27, 1987. An Order of February 28, 1991 determined that proof of damages would be limited to the period from September 8, 1986 until April 27, 1987 "unless and until plaintiff has evidence that the franchise would have extended beyond April 27, 1987 but for the 'termination' on September 8, 1986." As elaborated in a subsequent memorandum, this ruling does not prevent Hoai as a matter of law from recovering damages for the period beyond his contract with Sun Oil. See Memorandum of May 2, 1991 at 15-16. It does, however, recognize that the length of Hoai's franchise was limited by Sun Oil's right, which was in turn limited by the Petroleum Marketing Practices Act, to terminate or nonrenew the franchise and that Sun Oil had presented evidence that it would have legitimately invoked that right had it not earlier terminated Hoai by

entering into the consent agreement. See id. at 16-17. At the pretrial conference, Hoai was asked whether he had any evidence raising a genuine issue as to Sun Oil's intent or right to terminate him on April 27, 1987. He proffered testimony that when he entered into the franchise agreement with Sun Oil, he and a Sun Oil representative discussed a five year relationship. this evidence is, however, entirely consistent with the evidence that, once it found Hoai enmeshed in his conflict with Vo, Sun Oil decided to terminate the franchise at the end of the first year. As a consequence, there does not [-3-] appear to be a genuine issue as to whether Hoai may only recover for lost profits from September 8, 1986 to April 27, 1987. Accordingly, the rest of this order will proceed upon the assumption that Hoai may recover damages only for the period between

September 8, 1986 and April 27, 1987.

Final resolution of this issue must, however, await proper briefing. According, defendant may file a motion for summary judgment on this issue on or before August 1, 1991 to which plaintiff should file an opposition on or before August 20, 1991.

4. As explained in the Memorandum of May 2, 1991, Hoai may recover only damages in contract. That means that damages will be measured by lost profits plus incidental and consequential damages minus the costs avoided because of the loss of the franchise. At trial, Hoai will present evidence of lost profits, first by extrapolating from the profits earned in the several weeks that he worked at the station. Second, he will present evidence of the profits earned by Vo and then extrapolate his own earnings by taking into account his allegedly superior experience

in managing gasoline stations. Third, Hoai may introduce evidence concerning the profitability of the station at 2305 Pennsylvania Avenue and of service stations in the Washington metropolitan area from 1977 to 1990.

5. In its pretrial statement, Sun Oil indicated that it plans to present testimony from Vo and from Ernest Peele that Hoai did not put forward any of his own capital for the franchise at 2305 Pennsylvania Avenue, S.W. Because Hoai will not attempt to extrapolate lost profits from his capital investment, this [-4-] testimony is irrelevant.

6. The number of gallons delivered to and sold at 2305 Pennsylvania from 1977 until 1990 is relevant to the calculation of lost profits. Furthermore, there should be no dispute over these figures. Accordingly, the parties should show cause

on or before July 8, 1991 why they cannot stipulate these figures for trial.

7. Hoai has moved to strike the testimony of defendant's expert witness on the ground that the testimony of all of his experts except Rodney Sisk was stricken by the Magistrate Judge's Order of June 5, 1991. Hoai claims that Sun Oil's expert witness was named after June 5, 1991 and should therefore be struck as well. Sun Oil's counsel has, however, represented, and Hoai has not disputed, that Sun Oil's expert witness was identified to Hoai on May 24, 1991. Accordingly, Plaintiff's motion to strike defendant's expert witness should be, and is hereby, denied.

8. If Hoai's motion to reconsider the Magistrate Judge's Order striking the testimony of his expert witnesses besides Sisk is granted, it is nonetheless clear that the testimony of Lyndal Shaneyfelt

will not be allowed because it is not relevant to Hoai's theory of damages. More fundamentally, it is not clear whether any of Hoai's proffered experts have sufficient expertise to testify on the subjects on which they are scheduled to testify. Sisk is supposed to testify as to the reasonable expectations for the station. As an experienced gasoline station owner, he certainly has some expertise, but since it is unclear on what issues Sisk will testify, it is also unclear whether that expertise applies to his expected testimony. Similarly, Hoai seeks to present testimony from Joel Loesch, an accountant, on the profitability of the station at 2305 Pennsylvania Avenue. Here again, it is unclear whether Lesch's training or his general experience with small businesses qualifies him as an expert on the profitability of gasoline

franchises. Accordingly, Hoai should be, and is hereby, ordered to provide Sun Oil on or before July 9, 1991 with a report from each expert that he plans to present indicating the opinions those experts plan to offer at trial, the factual basis and assumptions underlying each of those opinions, and a description of the witnesses' expertise. Sun Oil should be, and is hereby, ordered to provide a similar report from its expert by that time.

9. Discovery in this matter has been closed. It appears, however, that the parties may benefit from additional discovery concerning the profits allegedly lost by Hoai due to the termination of his station. Furthermore, it appears that a deposition of Linda Fidel-Graham may further a just resolution of this matter. Accordingly, it is hereby ordered that the parties may conduct discovery on these

subjects on or before July 23, 1991.

10. Hoai will present the following witnesses and will be allotted the following amounts of time for direct examination of those witnesses:

a. Thanh Vong Hoai (2 hours)

b. Ernest Peale (35-40 minutes)

c. Mrs. Thanh Vong Hoai (5-10 minutes)

d. Alvin Wall (10 minutes)

e. Rodney Sisk (1 hour)

f. Joel Lesch (30 minutes)

g. Harry Murphy (30 minutes)

h. Linda Fidel-Graham (30 minutes)

i. Joseph Zaluski (30 minutes).

11. Sun Oil will present the following witnesses and be allotted the following amounts of time for direct examination of those witnesses:

a. Ernest Peele (1 1/2 hours)

b. Harold D. Vaughn (2 hours)

c. Melvin Sherbert (1 hour)

d. Than Vanh Vo (2 hours)

e. James Filby (2 hours)

f. Linda Fidel-Graham (1 hour)

12. It is unclear whether there is a genuine issue of material fact as to punitive damages. Although there is considerable evidence that Sun Oil knowingly entered into the consent agreement on September 8, 1986, it is not clear that, given the inchoate state of the law on the PMPA at that time, Sun Oil could have done so in willful disregard of the law. Accordingly, defendant may file a motion for summary judgment on this issue on or before July 15, 1991 to which plaintiff shall reply within 20 days thereafter.

13. Plaintiff has moved to reconsider the magistrate's order denying a motion to compel answers from My-Linh Soland. Soland

represented Hoai in his conflict with Vo. Because that issue is not relevant to the issues to be considered at trial, plaintiff's motion to reconsider the magistrates' ruling denying plaintiff's [-7-] motion to compel complete and truthful responses from a witness should be, and is hereby, denied.

14. On June 6, 1991, Hoai moved to disqualify Sun Oil's counsel, J. Gordon Forrester, on the grounds that he was calling Forrester as a witness. At a pretrial conference, this motion was granted in part and denied in part. In light, however, of the testimony that will be presented at trial on actual damages, this motion must be denied because the proffered testimony of Forrester is not relevant in the actual damages phase. Furthermore, according to Hoai's pretrial statement, Forrester will testify about Sun

Oil's decision to enter into the September 8, 1986 consent agreement with Vo. Hoai has, however, named four other witnesses who will testify on the same subject. As a consequence, it does not appear that Forrester is a necessary witness under Rule 3.7 of the Rules of Professional Conduct. Accordingly, upon further consideration, Hoai's motion to disqualify should be, and is hereby denied.

15. All further briefing in this matter shall be fifteen pages or less unless prior leave of Court has been granted.

/s/Louis F. Oberdorfer
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7133, et al. September Term, 1993
87cv02456

THANH VONG HOAI,
Appellant,

v.

FILED: MAR 25 1994
Ron Garvin, Clerk

Sun Refining and
Marketing Company, Inc.,
Appellee

and Consolidated Case No. 92-7134

Before: Edwards, Buckley and Randolph, Circuit Judges.

O R D E R

Upon consideration of appellant's petition for rehearing, filed April 8, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert H. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7133, et al. September Term, 1993
87cv02456

THANH VONG HOAI,
Appellant,

v.

FILED: MAY 25 1994
Ron Garvin, Clerk

Sun Refining and
Marketing Company, Inc.,
Appellee

and Consolidated Case No. 92-7134

Before: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph and Rogers, Circuit Judges.

O R D E R

Appellant's Suggestion For Rehearing In Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert H. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI 927 N. Highland St. Arlington, Va. Plaintiff, v. SUN REFINING AND MARKETING COMPANY, INC. 1801 Market Street Philadelphia, Pa. 19103 Defendants.	)C.A.87-2456-) LFO) [Filed:) Sept. 5,) 1987) 9:25 pm]

VERIFIED COMPLAINT UNDER THE FEDERAL PETROLEUM MARKETING PRACTICES ACT 15 U.S.C. 2801, ET SEQ. FOR DAMAGES AND FEES AND FOR DECLARATORY RELIEF

This is a case by a retailer-franchisee against a refiner-franchisor under the Federal Petroleum Marketing Practices Act, ("Act") 15 U.S.C. 2801, et seq., for violations of that act including an improper termination of the franchise of the plaintiff under the Act by which

plaintiff's business was destroyed and his business reputation and livelihood severely damaged. Plaintiff alleges against the defendant as follows:

I.

JURISDICTION

1) Jurisdiction is conferred on this Court, and this action is authorized by 15 U.S.C. 2805 (a), 28 U.S.C. 1331, 28 U.S.C. 1343, 28 U.S.C. 2201, and 28 U.S.C. 2202.

II.

VENUE [-2-]

2) Jurisdiction and venue repose in this Court because the service station in question, where the plaintiff did his business as a franchisee until improperly terminated by the defendant, is located in the District of Columbia at 2305 Pennsylvania Avenue, S.E. and therefore the plaintiff, under 15 U.S.C. 2805 (a) brings

action in this Court.

III.

PARTIES

3) Plaintiff, THANH VONG HOAI, ("Hoai") is an adult resident and citizen of the United States who resides at the above address in Arlington County, Virginia.

4) Plaintiff has had much experience in operating filling stations, body shops and related businesses in the United States since 1976. He has been an employee of the defendant prior to the events complained of herein, including serving as a supervisor for defendant of a number of their service stations in the Washington D.C. metropolitan area.

5) On a prior occasion to the one complained of herein, plaintiff was a dealer or franchisee for the defendant in Greenbelt, Maryland. That dealership lasted

for two years more or less.

6) Plaintiff, prior to the improper termination complained of herein, was a franchisee of the defendant as that term is defined in the Act.

7) Defendant, SUN REFINING AND MARKETING COMPANY, INC. ("Sun") is a major oil company whose main offices are in Philadelphia, Pennsylvania and which owns and/or franchises many [-2-] service stations in a number of states, particularly in the mid-Atlantic area of the country.

8) Defendant Sun is a franchisor as that term is defined in the Act and leased and franchised to the plaintiff Hoai the Sunoco service station site and business located at 2305 Pennsylvania Avenue, S.E., in the District of Columbia, which is the subject of the termination complained of.

IV.

FACTS

9) In March of 1986, plaintiff was encouraged by one Ernie Peele, area manager for defendant Sun, to apply for the franchise for the service station in question and did so.

10) In connection with this application, plaintiff was informed that he would need about $70,000.00 in capital to make a success of the contemplated Sun franchise.

11) Plaintiff had available from family sources approximately $35,000.00, or half this amount.

12) Previously plaintiff had been approached on several occasions by one Thanh Van Vo, another ethnic Vietnamese whom he knew slightly, to take a friendly loan if plaintiff needed it to start any new business, this Vo claiming, falsely, as it turned out, to own and operate a large

construction business.

13) On March 21, 1986, plaintiff and this Vo met with Ernie Peele, defendant's area manager, in the restaurant and coffee shop of the Howard Johnson's Motor Hotel on U.S. Route 1 in Alexandria, Virginia.[-3-]

14) There plaintiff introduced this Vo to Peele as the man who was going to lend him the other $35,000.00 that he needed to get the gas station franchise for the Pennsylvania Avenue station under way.

15) At this meeting Peele, in the course of his duties, questioned this Vo thoroughly about any partnership, hidden equity interest, high immediate interest, over hasty payback schedule or any other thing on the part of Vo that would hamper the utility of such a loan for a start-up franchisee such as plaintiff was in this instance and was informed by Vo that it was only a friendly loan at reasonable interest

to be paid back over time after a year or longer if necessary.

16) At this meeting this Vo agree to pay, as part of this loan, the initial deposit fees for the franchise, totalling $7,000.00 and Vo did disappear from the meeting for an unusually long time and returned to the meeting with two cashier's checks for the defendant totalling the $7,000.00 amount which he gave to Peele.

17) Later, plaintiff's application for the franchise was approved by the defendant at the required levels in Philadelphia and elsewhere and on March 31, the franchise agreement which is attached as Exhibit A hereto and incorporated, was entered into between the plaintiff and the defendant.

18) Though the said agreement is entitled trial franchise agreement it is as a matter of mixed fact and law a full franchise agreement because as a matter of

law under 2803(b)(1)(B), since plaintiff had previously been a franchisee [-4-] for defendant in Greenbelt, Maryland, he cannot have been a trial franchisee and regardless of the title of this agreement was entering and did enter a franchise agreement and lease on March 21, 1986, as a franchisee not a trial franchisee. See Exhibit B hereto, the earlier franchise agreement between the parties for the Greenbelt dealership which is incorporated by reference.

19) The man Vo claimed to plaintiff that he was putting up the money in the amount of $35,000.00 which he had promised by putting the money in the gas station bank account which he took sole control of under the pretext of protecting his money. Vo refused to let plaintiff have access to or signature for this account, but that was unknown to defendant Sun, who thought at

the time that the gas station account was under control of plaintiff.

20) In fact this was a fraud of the man Vo upon plaintiff in which he took control of the station account, took control of the station's daily receipts, and placed them into the account, drawing on them there. This Vo put no money that was actually his into the station account which he had established for his signature only at the McLean Bank in McLean, Virginia.

21) That something was wrong first was indicated to defendant on or about April 26, 1986, when the first check on this station account for the first load of gasoline from defendant for the station did not clear for insufficient funds and defendant notified plaintiff on that day. [-5-]

22) When plaintiff remonstrated with

this to the man Vo, and Vo's evident fraud, plaintiff was threatened by Vo and Vo's colleague Thach, with murder and physical damage to his person and the fraud soon turned to extortion.

23) After unsuccessful attempts to get law enforcement officials to help him and all the while being threatened with serious harm, plaintiff, in mid to late May began to tell Ernie Peele that he was being threatened with violence and murder.

24) In the meantime this Vo and others conveyed to plaintiff a credible threat that if he came to his own gas station franchise any more he would be killed and his family harmed.

25) Under duress, plaintiff was forced by Vo, his friend Thach, and a crooked lawyer, Arif, to sign a contract signing over all his interest in the gas station business to Vo for one dollar, which he was

never given.

26) In the meantime in a separate but related "scam" Vo, Thach and two other colleagues, aided by the same "street muscle," a gang of vicious Vietnamese thugs called the Çowboys, including one Minh, one Tong, one Lam and one Man, defrauded and extorted plaintiff and his family of their $35,000.00 capital and more, up to $49,000.00 in connection with the sale to plaintiff and his wife of an oriental specialty food shop on Wilson Boulevard in Arlington, Virginia and the compelling of the purchase of inventory for that business which was then seized illegally and converted. [-6]

27) Plaintiff told defendant's representative Peele and his boss, one Vaughn, also an employee of defendant, of these events as they occurred and asked the help of defendant continuously in getting

rid of these criminals who were victimizing him and in getting his station and franchise back.

28) Peele and Vaughn promised to help plaintiff on several occasions over the summer of 1986, from June 5 to August 28, 1986, as he proposed various plans to get his station back.

29) A number of these plans were stalled by the duplicity of plaintiff's then attorney, one My-Linh Soland, who, unbeknownst to plaintiff, was also representing some of those who were defrauding and extorting plaintiff.

30) After plaintiff dismissed attorney Soland upon learning of her duplicity and obtained a new attorney, the defendant's representative Peele again agreed to a plan to try and get plaintiff back his gas station franchise and business.

31) Under this plan Peele signed, as

the area representative of defendant Sun, a certification that plaintiff was the legitimate franchisee of the defendant. This certification was on a notice that plaintiff and his new attorney had drawn up for this man Vo and those he had brought into the station to quit the premises.

32) On August 25, 1987, plaintiff and his new attorney and his new attorney's grown son went to the station at 2305 Pennsylvania Avenue, S.E. and delivered this notice-to the manager of Vo, Vo not being there at the time. Vo's employees and henchmen quit the premises and subsequently Vo's attorney [-7-] came and agreed that his client would abide by the word of defendant Sun's representative Peele.

33) Instead of obeying this agreement of settlement, however the man Vo trumped up a sham complaint and TRO request on the 28th and took plaintiff into Superior Court

on a TRO hearing that was blocked out a day in advance but noticed only an hour or so before.

34) Vo and his counsel successfully eliminated plaintiff's representation at this hearing, by falsely claiming that his new attorney, who, was appearing pro bono, was a perpetrator of violence, a defendant and a witness, and getting him disqualified.

34) (sic) In the bizarre hearing that ensued the following day with yet another attorney for plaintiff herein, plaintiff herein, as a defendant therein, put on uncontradicted testimony of threats of murder and violence which was corroborated by Peele.

35) Vo declined to testify and subject himself to cross-examination.

36) The Superior Court ignored all this and interrupted the man Vo's case for

a TRO based on an alleged conversion to impose upon the case a wrongful idea of wrongful eviction by plaintiff against Vo, which had never been pleaded.

37) In an illogical leap based upon nothing but untruthful representations of Vo's then counsel, the Court found that Vo was a tenant of Sun, which, the evidence was clear and uncontested, was totally unknown to Sun. [-8-]

38) At this hearing, at Peele's request, the new lawyer obtained by plaintiff herein and his attorney and his attorney's son, represented Sun as well, Sun having been named as a defendant in that proceeding.

39) The Superior Court Judge, Wagner, issued a TRO for 10 days ordering plaintiff herein, his attorney and his attorney's son to turn over the station and what was on the premises and stay away from the station

for 10 days.

40) The TRO Judge promised plaintiff herein several times that he needn't be too concerned because it was only a TRO hearing and he would get a full hearing before there was any injunction.

41) However, there never was any such hearing. On September the 8th, 1986, without any notice to plaintiff herein or his attorney or his attorney's son, as the other defendants in that proceeding, the defendant herein, Sun, and the man Vo, the plaintiff in the Superior Court proceeding made a "deal" and in a manner unknown to plaintiff herein, persuaded another Superior Court judge, Eilperin, to enter a "consent" to extent the TRO for seven months as to Vo and defendant Sun only, giving the gas station to the man Vo and his colleagues for that time, effectively terminating and destroying plaintiff's

franchise and business. The original TRO expired as to plaintiff and his counsel and his counsel's son.

42) There was no notice of this proceeding beforehand to plaintiff and no explanation afterwards other than that Sun had to remain "neutral" and could not get involved in disputes [-9-] between plaintiff and Vo, his "friend."

43) How it was neutral to give plaintiff's station and business to a thug and extortionist has never been explained by Sun, though they insisted while giving the station to Vo that plaintiff was still their franchisee.

44) On information and belief, plaintiff states that defendant Sun's local counsel, one J. Gordon Forester, misrepresented to certain of the Sun personnel misleadingly and erroneously, as a matter of fact, that Sun had no choice

but to "extend" the TRO, for the said seven months when, in fact, the TRO by law, the rules, and its own terms, was set to expire in ten days of its own accord.

45) Sun ratified the acts of its agent and attorney, Forester.

V.

COUNT: VIOLATION OF THE
PETROLEUM MARKETING PRACTICES ACT:
UNLAWFUL TERMINATION

46) Plaintiff repeats and incorporates herein by reference the allegations of paragraphs 1) through 45) above.

47) The aforesaid "deal" of defendant Sun with Vo on September 8, whereby Sun agreed, without any notice or prior warning to or consultation with plaintiff to take his gas station franchise and de facto give it to Vo for seven months constituted a termination of plaintiff's franchise which was illegal under the Act. Vo had no valid claim to the franchise and was claiming it in violation of the PMPA and the franchise agreement, which Sun was bound by as much as the plaintiff. [-10-]

48) The termination of plaintiff's franchise was illegal in that it was a

termination prior to the conclusion of the term of the franchise agreement. 15 U.S.C. 2802(a)(1).

49) The defendant Sun did not give the notice required by Section 104 of the Act (15 U.S.C. 2804).

50) Since no notice at all was given prior to this termination of plaintiff's franchise, Section 2802 (b) of the act does not apply.

51) Even if this was not a termination (as it surely was,) in the alternative, defendant failed to renew the franchise at the end of this time during which they "extended" the TRO with Vo and did so in violation of the Act's applicable provisions.

52) The defendant's entire course of behavior throughout this ordeal and travail of the plaintiff was in violation of the strictures of the Act and the violations

were deliberate and in bad faith on the part of their agent and attorney Forester, whose acts defendant ratified and were therefore in willful disregard of the requirements of Sections 102 or 103 of the Act (15 U.S.C. 2802 or 2803) and/or the rights of the franchisee thereunder.

Wherefore, the plaintiff claims the full value of the franchise, which was terminated, over a span of twenty years, including all of his lost profits therein, according to the agreement as understood between himself and defendant, in excess of thirty million dollars ($30,000,000.00) and to exemplary damages in accordance with the Act and to reasonable attorney and expert witness fees and to a declaratory judgment that the act prevents disorderly transfers in violation of its terms in which [-11-] franchisors knowingly cooperate with wrongdoers and tortfeasors who they well

know are engaging in fraud and extortion.

A jury trial is respectfully demanded.

TANH VONG HOAI

by

/s/ Laurence A. Elgin
2762 Woodley Place, N.W.
Washington, D.C. 20008
(202) 628-1114
Bar No. 159582

/s/ John D. Hemenway
4816 Rodman St. N.W.
Wasshington, D.C. 20016
(202)244-4819
Bar No. 379663

VERIFICATION

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA)

THANH VONG HOAI, being first duly sworn, deposes and says that he is the plaintiff named in this complaint that he has read the same, and that the statements contained therein are true and correct to the best of his knowledge, and, where stated or evident from the context, of his information and belief.

/s/ Thanh Vong Hoai

Subscribed and sworn to before me this 2nd day of September, 1987.

/s/ NOTARY PUBLIC

Supreme Court, U.S.
FILED

94 343 AUG 2 3 1994

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THANH VONG HOAI,
Petitioner,

SUN REFINING AND MARKETING COMPANY, INC.,
Respondent.

APPENDIX #2 OF 2 TO
Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

Laurence A. Elgin
8929 Sleaford Place
Annandale, Virginia
22003
(202) 628-1114

1:43 PM

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My commission expires:

My Commission Expires June 22, 1990

[NOTE: IN READING THIS DOCUMENT, ENTITLED "DEALER TRIAL FRANCHISE", ONE SHOULD REMEMBER THAT UNDER THE STATUTE, PLAINTIFF HOAI IS NOT A TRIAL FRANCHISEE, DESPITE THE USE OF THE WORD "TRIAL" BECAUSE HE PREVIOUSLY OPERATED STATIONS AND HAD WORKED FOR SUN OIL CO.]

SUN 420-I-T.F.

Date: March 27, 1986
Duns No: 0004-4180-14
Division: 750

DEALER TRIAL FRANCHISE
PART I
COVER PROVISIONS

THIS TRIAL FRANCHISE is made and executed by the herein named Company and Dealer for purposes of stating the terms and conditions by which Company will make available for sale, Company's branded motor fuels to Dealer, and Dealer will operate Dealer's business, including the resale of Company's branded motor fuels to the public, at the Premises described below. This Trial Franchise constitutes a "trial franchise" as that term is used in and

defined by Title 1 of the Federal Petroleum Marketing Practices Act, 15 U.S.C. section 2801, et seq., hereinafter referred to as "the Act".

COMPANY:	SUN REFINING AND MARKETING COMPANY
COMPANY'S ADDRESS:	1801 MARKET STREET Philadelphia, PA 19103
DEALER:	THANH VONG HOAI
PREMISES' ADDRESS:	2305 Pennsylvania Ave., S.E. Washington, D.C. 20020

TYPE OF MOTOR FUEL FRANCHISE: RETAIL
GASOLINE SALES: Full and Self Service
BUILDING USE: Conventional 3-Bay Service, Canopy and Kiosk

TERM: THE TERM OF THIS TRIAL FRANCHISE IS ONE YEAR, BEGINNING ON APRIL 10, 1986, AND ENDING MARCH 31, 1987. COMPANY MAY ELECT NOT TO RENEW THIS TRIAL FRANCHISE AS OF THE DATE LAST ABOVE STATED BY PROVIDING DEALER WITH WRITTEN NOTICE IN ACCORDANCE WITH THE PROVISIONS OF SECTION 104 OF THE ACT. THE PROVISIONS OF SECTION 102 OF THE ACT,

LIMITING THE RIGHT OF COMPANY TO FAIL TO RENEW A FRANCHISE RELATIONSHIP ARE NOT APPLICABLE TO THIS TRIAL FRANCHISE. IN ADDITION, COMPANY MAY TERMINATE THIS RELATIONSHIP PRIOR TO THE DATE LAST ABOVE STATED IN THE EVENT OF A VIOLATION OR BREACH OF THIS TRIAL FRANCHISE RELATIONSHIP, OR OF THE TERMS AND CONDITIONS CONTAINED IN THIS TRIAL FRANCHISE, OR FOR ANY REASON ALLOWED BY SAID ACT.

RENT: Dealer shall pay to Company rent for said Premises, in monthly installments in accordance with the following schedule: For the period April 10, 1986 through April 9, 1987, Four Thousand five Hundred Eighty Five Dollars ($4,585.00) per month. Each monthly installment is due and payable in advance, without demand or notice, on or before the fifth (5th) day of the month. Rent shall be prorated on a daily basis for

periods of less than one (1) month.

HOURS AND DAYS OF OPERATION: Dealer will operate Dealer's business and the Premises in the manner required by this Trial Franchise during the following hours per day and days per week: 24 hours a day/7 days a week

COMPANY'S EQUIPMENT: For use by Dealer in promoting and selling Company's branded motor fuels, Company loans to Dealer, for the term of this Trial Franchise, the following equipment which is or will be installed on said Premises by Company: 3 - Single Retros Leaded, 6 Retros Blended, 2 - Single Retros, Diesel, 2 - Sunoco Diamond Signs & Poles, 1 - Set Sunoco Letters

UNDERLYING LEASE: NOT APPLICABLE

PERSONAL SUPERVISION: This Trial Franchise is made on the condition and understanding that Thanh Vong Hoai will personally manage the daily operation of Dealer's business.

Prior written consent of Company is required in the event the above named individual desires to cease personal management of Dealer's business. Said consent of Company shall not be unreasonably withheld.

COLLATERAL DEPOSIT: Terms and conditions governing collateral deposits listed below are set forth in Part IV Collateral Deposit Provisions.

Federal identification of Social Security No.: 586-40-1891, State Code No.: 16

Cash Portion of Deposit Only: Five Thousand Dollars ($5,000.00)

Plus an additional amount to be accumulated from time to time at the rate of one-half (1/2 cent) cents per gallon on all deliveries of motor fuel until a total of Twenty Five Thousand Dollars ($25,000.00) has been accumulated.

CREDIT CARD IMPRINTER: Dealer acknowledges

receipt of two (2) Credit Card Imprinter and Mount Box unit(s) and agrees to pay Company in advance a rental at an annual rate of Forty Dollars ($40.00) per unit, effective the first day of the month following installation and extending to the next June 30th. Subsequent annual rental charges will date from July 1st for each succeeding year. Installation and maintenance costs of said units shall be paid by Company.

Dealer agrees not to remove said unit(s) from the Premises where installed, and to pay Company One Hundred Thirty Two Dollars ($132.00) per unit in the event said unit(s) are lost or destroyed. Dealer agrees to return said unit(s) to Company upon request and hereby gives Company the right to remove the same at any time without notice and, in either event Company shall refund any unearned prepaid rental.

Company reserves the right at all times to change the foregoing rental upon giving Dealer thirty (30) days' prior written notice.

PARTS OF DEALER TRIAL FRANCHISE:

Part I Cover Provisions
Part II General Provisions
Part III Lease Provisions
Part IV Collateral Deposit Provisions
Part V Credit Card Acceptance Provisions
Part VI Maintenance Provisions
Part VII Daily Recordkeeping and Inventory Control Provisions

The Provisions above constitute Parts of this Trial Franchise, and are incorporated therein and made a part thereof for all purposes.

NOTE TO DEALER: This is a binding legal document containing several Parts. You should carefully read each Part before signing in the space provided below.

EXECUTED THE 8TH DAY OF APRIL, 1986

WITNESSES: DEALER:

/s/ E.Peele /s/ Thanh Vong Hoai

COMPANY:

/s/ Betty J. Boyd BY: /s/ JH Vaughn

TITLE: DIVISION SALES MANAGER

* * * * *

9. UNCONTROLLABLE EVENTS/ALLOCATION

Company and Dealer shall be forgiven their respective obligations hereunder to the extent that performance is delayed or prevented by causes reasonably beyond the control of either party, except any accounts owed by either party to the other. Company may allocate products among Dealer and other customers in the event it determines that any curtailment, shortage, or unavailability of products for any reason whatsoever exists and shall not be obligated to make up shortages resulting therefrom, nor shall Company be liable to Dealer for loss of sales, profits or business by reason of such allocation.

* * * * *

15. NOTICES

Any notices required by, or otherwise given in connection with, this Dealer Franchise shall be in writing and signed by the party giving such notice. Any notice directed to Company shall be mailed or delivered to Company's address stated in Part 1 Cover Provisions, and notices directed to Dealer shall be mailed or delivered to Dealer at the Premises.

* * * * *

17. ENFORCEMENT: APPLICABLE LAW; RENEWAL, NONRENEWAL AND TERMINATION OF THIS DEALER FRANCHISE

a. Company has the right to enforce and require specific performance of all provisions of this Dealer Franchise including, but not limited to, Company's right to seek injunctive relief or any other rights or remedies available to Company.

b. This Dealer Franchise is subject to and governed by the Act, which is made part of this Dealer Franchise for purposes of expressing the grounds upon which it may be terminated and nonrenewed by Company. The Company's right to terminate or nonrenew under the Act shall be in addition to, and not in extinguishment of, all other rights and remedies provided in favor of Company by applicable law and this Dealer Franchise. Therefore, should Dealer fail to substantially comply with, or violate, any requirement imposed upon, or promise made by Dealer in this Dealer Franchise, Company may nonrenew or terminate this Dealer Franchise.

c. Prior to the end of the term of this Dealer Franchise, Company may determine to renew and continue its franchise relationship with Dealer on the basis of proposed changes and additions to the

provisions hereof (including, but not limited to, changes in the rates and amounts of rent to be paid by Dealer for the Premises); and shall advise Dealer of same. All such changes and additions proposed by Company shall be the result of determinations made by Company in good faith and in the normal course of business. Should Dealer and Company fail to agree upon such changes and additions, Company shall have the right, upon notice to Dealer, to nonrenew this Dealer Franchise and the franchise relationship with Dealer as of the end of the term stated in Part I Cover Provisions. Should Dealer and Company agree upon such changes and additions, then Company agrees to renew this Dealer Franchise and continue the franchise relationship with Dealer, subject to and in accordance with the agreed changes and additions and the execution by

both parties of a renewal Dealer Franchise.

d. In the event Company should violate any substantive provision of this Dealer Franchise and not promptly correct same, Dealer may terminate this Dealer Franchise with Company at any time upon 90 days' prior written notice to Company. Said written notice must specify the particular reason or reasons which give rise to such termination in order to be effective.

e. Upon the effective date of the termination or nonrenewal hereof,

(1) All unpaid accounts owed by Dealer to Company, shall be due and payable in full, and shall bear interest from such date until paid at the rates established by Company's credit terms with Dealer;

(2) Dealer shall cease the use of Company's brand identification and credit card system, and shall forthwith return the same to Company, together with all of

Company's loaned Equipment, in good order and condition, at Dealer's expense;

(3) Company shall repurchase from Dealer all Company branded motor fuels at Dealer's cost therefor; the amount thereof to be paid to Dealer or applied to Dealer's unpaid account with Company, as determined by Company.

* * * * *

19 . SALE AND ASSIGNMENT

a. Subject to the following provisions, Dealer may make a sale of Dealer's business:

(1) For purposes hereof, a "sale of Dealer's business" includes: (a) any reorganization of Dealer's business, such as incorporation or the formation of a partnership or other business entity subsequent to the date of this Dealer Franchise whereby another person, not previously a party hereto, acquires rights

with respect to Dealer's business or its operation; (b) any transfer or assignment of an interest in Dealer's business or any part thereof or an assignment or subletting in whole or in part of the Premises to any person, firm or corporation not a signatory party hereto. The term "Dealer's business" includes purchasing and reselling of Company's branded motor fuels and the use and possession of the Premises. A change in the marital status of Dealer, if an individual, and granting of a lien or security interest in Dealer's business for financing purposes, shall not constitute a sale of Dealer's business.

(2) At least sixty (60) days' prior to the effective date of a sale of Dealer's business, Dealer shall notify Company in writing of such sale. The notice to Company shall include the name and the current address of the purchaser(s),

together with the purchase price, if any, and all other essential terms and conditions of the sale. Copies of all documents (including the proposed sale contract) that will be used in connection with the sale shall also be provided to Company. Dealer represents to Company that all information supplied to Company with respect to a sale of Dealer's business is true and correct.

(3) Upon receipt of Dealer's notice given pursuant to preceding paragraph, Company shall thereafter have at least sixty (60) days' time to conduct an examination of the purchaser's credit standing, financial condition, business suitability to function as a franchisee of Company and to evaluate the proposed sale of Dealer's business. In this respect, Dealer and purchaser(s) shall provide Company with all information as Company requests for purposes of making its

examination. Dealer shall bear the cost of the examination of the purchaser's credit standing. Such examination, and any disapproval or conditioned approval made by Company shall be in accordance with, and based upon, reasonable and objective business practices and standards. Company shall not be held liable for any losses caused Dealer by such disapproval or conditioned approval.

(4) If, in Company's opinion, based upon objective and accepted business practices, such person does not have sufficient credit standing or business experience to function as a dealer in the manner required by this Dealer Franchise, then Company shall notify Dealer in writing of its opinion and may refuse to permit the contemplated sale of Dealer's business, or by such writing may condition its approval upon a revision of credit terms, upon execution by such party

of a Trial Franchise (ass that term is used in the Act) as a substitute of this Dealer Franchise and upon the attendance and successful completion by such party of Company's dealer training school.

(5) If, based upon Company's examination, such person acquiring an interest in Dealer's business does have sufficient credit standing and business experience to function as a dealer in the manner required by this Dealer Franchise, then Company shall approve the assignment without condition, except Company shall have the right to require such person to execute a Trial Franchise (as that term is used in the Act) as a substitute for this Dealer Franchise and to require such person to attend and successfully complete Company's dealer training school.

(6) Each actual or contemplated sale of Dealer's business, shall be made subject to

the foregoing provisions of this Dealer Franchise. An assignment of this Dealer Franchise, whether or not made in the manner permitted by these provisions shall not alter or discharge Dealer's obligations hereunder to Company, except as agreed to beforehand in writing by Company, or when the sale of the Dealer's business is made to Company.

(7) Should Dealer complete a sale of Dealer's business in whole or in part and fail to notify Company as above required, or make a sale or assignment which has been disapproved by Company or fail to provide Company with complete information as requested by Company, such action or failure, as case may be, shall be treated for all purposes as fraud.

b. Company may assign this Dealer Franchise to any distributor, jobber, refiner or other "franchisor". as that word is used in

the Act subject to the following:

(1) Assignee shall agree in writing with the Company to perform and comply with all of the Company's obligations hereunder.

(2) Company shall notify Dealer in writing of the name and the address of assignee and the effective date of assignment.]

(3) Such assignment when made in the manner above provided shall not be treated as either a termination or nonrenewal of this Dealer Franchise, or of any of the Dealer's rights as a "franchisee" under the Act, but this Dealer Franchise and Dealer's rights shall continue in full force and effect. Assignee shall succeed to all the rights and privileges provided in favor of Company under this Dealer Franchise and the Act.

* * * * *

7. SURRENDER OF PREMISES:

a. This Lease and Dealer's use and possession of the Premises (including all assignments and subletting by Dealer) shall end as of the effective date of the termination, nonrenewal or cancellation of this Dealer Franchise, whereupon Dealer shall immediately surrender, quit and return possession of the Premises to Company. Notice and demand to quit and for possession and re-entry by Company are waived.

b. Should Dealer fail to surrender, quit and return possession of the Premises to Company at the end of this Lease, Company shall have the right to enter upon the Premises and evict Dealer therefrom for purposes of repossessing the same without having liability to Dealer for trespass or damage by reason of such re-entry and eviction.

c. In addition to Company's right of re-

entry and eviction, Company may detain, distrain and take possession of all property belonging to Dealer and others found on the Premises for unpaid rent, and may sell or otherwise dispose of such property in accordance with applicable law, without liability to Dealer by reason of such action. Subject to the foregoing, Dealer shall remove all of Dealer's personal property from the Premises at end of this Lease, and any property left or found upon the Premises ten (10) days after Dealer has been requested to remove the same, may be removed, stored, or disposed of by Company without liability to Dealer for the value, loss or damage thereto occasioned by such removal storage or disposition. Costs incurred by Company for removal, storage and disposition of Dealer's property so left or found upon the Premises shall be borne by Dealer and paid

to Company.

d. Notwithstanding the foregoing, and without waiving any of its rights to evict Dealer and re-enter the Premises, which rights shall be continuing and remain in full force and effect from and after the end of this Lease, if Dealer remains in possession of the Premises for whatever reason other than by virtue of a separate agreement in writing signed by Company, then Company may elect to treat Dealer as a tenant at will of the Premises, subject to the further right to terminate such tenancy upon thirty (30) days' prior written notice to Dealer, and Dealer shall be obligated to pay to Company, and Company shall be entitled to collect from Dealer, rental for said tenancy equal to one hundred fifty (150%) per cent of the final monthly installment of rent stated in Part I Cover Provisions, or any amendment and

ratification thereto, of this Dealer Franchise for each thirty (30) days or part thereof of said tenancy at will. Acceptance by Company of rent for said tenancy at will, and Company's decision, failure or delay in evicting Dealer and re-entering the Premises at the end of this Lease shall not be treated or construed as a renewal of this Dealer Franchise (or this Lease which renewal cannot be made except by written agreement for that purpose signed by Company.

* * * * *

[EXCERPT FROM PREVIOUS HOAI DEALERSHIP WITH SUN OIL]

SUNMARK INDUSTRIES

[LOGOS]

A Division of Sun Oil Company of Pennsylvania

September 21, 1981

Mr. Thanh V. Hoai
7906 Cherrywod Lane
Greenbelt, Md. 20770

Re: Contract #0017-8475-01

Dear Mr. Hoai:

We are pleased to enclose the following

paper/papers which have been completely executed:

1) Letter of Consideration
2) Maintenance Letter
3) Dealer's Agreement
4) Inventory Control Amendment to Dealer's Agreement
5) Credit Card Acceptance Agreement
6) Imprinter Agreement
7) Night Delivery Letter

Please retain these documents for your files.

Very truely yours
SUNMARK INDUSTRIES, a Division of Sun Oil Company of Pennsylvania

/s/ JW Zalewski
J. W. Zalewski

Enclosures

JWZ:h

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	:
	:
Plaintiff,	:
	:
v.	: Civil Action
	: No. 87-2456
SUN REFINING AND	: Judge Oberdorfer
MARKETING COMPANY.	: Magistrate Attridge
Defendant.	:

DEFENDANT'S NOTION FOR SUMMARY JUDGMENT
ON THE ISSUE OF EXEMPLARY DAMAGES

COMES NOW Defendant, Sun Refining and Marketing Company, by counsel, and moves the Court to enter Summary Judgment in its favor and against Plaintiff on the issue of exemplary damages for the reason that there is no genuine issue as to any material fact and Defendant is entitled to the entry of judgment on the issue of exemplary damages as a matter of law.

In support of this Motion, Defendant submits the attached Memorandum of Points and Authorities and Statement of Material Facts as to Which There if (sic) No Genuine

Issue.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.

/s/ J. Gordon Forester, Jr. #4424
Stephen H. Abraham #385849
1620 L Street, N.W.
Suite 900
Washington, D.C. 20036-5605
Telephone: (202) 452-1400

[July 11, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action
	:	87-2456
SUN REFINING AND	:	Judge Oberdorfer
MARKETING COMPANY.	:	Magistrate Judge
Defendant.	:	Attridge

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
ON THE LIMITATION OF DAMAGES
FROM SEPTMBER 8, 1986 TO APRIL 27, 1987

The defendant moves this Court to grant summary judgment on the issue of damages by limiting Hoai's claim to reasonable profits, if any, from the station at 2305 Pennsylvania Avenue, S.E. for the period from September 8, 1986 to April 27, 1987.

The attached Memorandum of Points and Authorities and the Statement of Material Facts As To Which There is No Genuine Issue are attached in support of this motion.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.
/s/ J. Gordon Forester, Jr. #4424
1620 L Street, N.W.
Suite 900
Washington, D.C. 20036-5605
Telephone: (202) 452-1400

[July 26, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action
	:	No. 87-2456
SUN REFINING AND	:	Judge Oberdorfer
MARKETING CO.	:	Magistrate Attridge
Defendant.	:	

MOTION IN LIMINE FOR EVIDENTIARY RULINGS

This is the defendant's second Motion In Limine. The first was to establish the period of time for which the franchisee may be entitled to lost profits, if any. In the response to this Motion, plaintiff has raised a number of issues which go far beyond the question of damages that is before this court. In fact, if plaintiff were able to proceed with the irrelevant issues he has raised, it would expand this trial far beyond the three days which have been scheduled.

This court has ruled that Mr. Hoai's

franchise was improperly terminated on September 8, 1986, and that the franchise was actually terminated with notice on April 28, 1987. Therefore, based upon this ruling, Mr. Hoai would be entitled to claim the profits of the station during that period, provided he can establish that any profits were earned. Thompson v. Kerr-McGee Refining Co., 660 F.2d 1380 (10th Cir. 1981). It is respectfully requested that the court [-1-]

* * * *

[Dec. 21, 1990]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VONG HOAI Plaintiff, v. SUN REFINING AND MARKETING COMPANY, INC., Defendant.	)))))Civil Action) No. 87-2456) Judge Oberdorfer) Mag. PJA))

PLAINTIFF'S OPPOSITION TO SUMMARY JUDGMENT ON EXEMPLARY DAMAGES

It is not relevant that the law does not favor punitive damages because Congress has prescribed a standard in the Act defining when they are to be granted. The common law of the District has been preempted on this point. We ask the Court, therefore, to ignore defendant' recitation of the common law of punitive damages and concentrate instead on the mandate of Congress.

The only issue here, as the Court pointed out, is whether there was the

required willfullness. As the Court noted in colloquy, there is no question here that there was disregard of 15 U.S.C. 2802, but as to whether it rose to the level of willful disregard the Court said it was not yet convinced. Plaintiff agrees this question remains to be analyzed. The memorandum supporting the motion is not particularly helpful in this regard.

Plaintiff suggests that a proper analysis can be arrived at by ignoring the attempts of the defendant to import into the language of the Act an element of scienter which Congress chose not to include. There are many acts of Congress in which a requirement of willfulness is conjoined by an "and" with a requirement

[-1]

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456
SUN REFINING AND	)	
MARKETING CO.	)	Judge Oberdorfer
Defendant.	)	

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S SECOND MOTION IN LIMINE
(for Evidentiary Rulings)

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#1 Order of Oberdorfer, J. of October 17, 1991

#2 Motion In Limine filed by Sun, November 15, 1991

#3 Motion In Limine filed by Sun, December 21, 1991

#4 Motion For Protective Order and for Discovery Conference filed by Sun, filed January 10, 1991

#5 Transcript of Telephone Conference of October 15, 1990

#6 Request for Admissions filed January 8, 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VONG HOAI Plaintiff, v. SUN REFINING AND MARKETING COMPANY, INC., Defendant.	)))))Civil Action) No. 87-2456) Judge Oberdorfer) Mag. PJA)

OPPOSITION OF THE PLAINTIFF TO DEFENDANT'S MOTION TO LIMIT THE DAMAGES WITHOUT AUTHORITY TO DO SO

I. INTRODUCTION

The motion of the defendant to artificially limit the amount of damages plaintiff may show at trial demonstrates no authority for this proposition in the Petroleum Marketing Practices Act itself, 15 U.S.C. 2801, et seq., (PMPA) or in the reported case law. It relies, in its supporting memorandum, upon misrepresentations of existing law, and upon inappropriate analogies. Further,

there is a disturbing pattern that has now become the normal practice by defendant in this case, (unfortunately,) of some seriously distorted and even false representations of the facts thus far demonstrated or those that are contended and of what has already been decided in the various litigations of Mr. Hoai.

II. STATUTE ITSELF: CLEAR LANGUAGE: NO LIMITATION

First, we turn to the clear language of the statute itself: The only section. at issue here, since plaintiff sought no injunctive relief, is subsection 15 U.S.C. 2805(d). The full text of that section is as follows: [-1-]

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VONG HOAI Plaintiff,	)
v.	) Civil Action No. 87-2456
SUN REFINING AND MARKETING COMPANY, INC., Defendant.	) Judge Oberdorfer Mag. PJA

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON EXEMPLARY DAMAGES IN THE AMOUNT OF $650,000.00

Plaintiff moves the Court to grant him summary judgment for exemplary damages pursuant to 15 U.S.C. 2805(d)(1)(B) $650,000.00 based on the recent verdict of the jury on compensatory damages and the admissions of the defendant that it made no effort to ascertain whether it was complying with the Act or not when it illegally terminated the plaintiff, an amount designed to deter a corporation with the income and assets of the defendant whereas any lesser amount would

not do so, given the conduct of the defendant Sunoco then and throughout this proceeding.

Respectfully submitted.

THANH VONG HOAI

By:
/s/ Laurence Elgin #159582
8929 Sleaford Place,
Annandale, Virginia 22003
(202) 628-1114

[FACSIMILE OF A LETTER FROM SUN OIL]
[Written six months after the franchise was destroyed by the Sun Oil Consent Agreement AND NOT Hoai, but extortionist Vo was in possession of the station, as Sun knew.]

SUN
[Logo]

Sun Refining and Marketing Company
4041 Market Street
Aston PA 19014
215 499 5700

March 2, 1987
Duns Number: 0004-4180-14

Thanh Vong Hoai
2305 Pennsylvania Ave. S.E.
Washington, DC 20020

Dear Mr. Hoai:

Please refer to your Dealer Trial Franchise, dated March 27, 1986, between you and Sun Refining and Marketing Company, hereinafter referred to as "Sun". As you know, Sun's representative has attempted to verify your compliance with its Daily Recordkeeping and Inventory Control Provisions, as required in the above Franchise. Sun sent you a letter dated December 3, 1986, asking that you

comply with this provision. Your continued failure to comply with the requirements of this program leaves Sun no alternative but to terminate its franchise relationship with you.

Therefore, please take notice that effective April 7, 1987, Sun intends to terminate your Dealer Trial Franchise dated March 27, 1986, for the above-stated reason, and as per the following sections of the Federal Petroleum Marketing Practices Act:

Section 102(b)(2)(A)	Your failure to comply with a provision of the franchise, which is both reasonable and of material significance to the franchise relationship.
Section 102(b)(2)(B)	Your failure to exert good faith efforts to carry out the provisions of the franchise.
Section 102(c)(11)	Your knowing failure to comply with Federal, State or local laws or regulations relevant to the operation of the marketing

premises.

Attached to this notice is a Summary of Title 1 of the Federal Petroleum Marketing Practices Act.

Very truly yours,
SUNOCO MARKETING

/s/ H.J. Vaughn
H. J. Vaughn
Sales Manager

Attachment
cc: D.M. Zebley
H. L. Zoretic
E. L. Peele
B. J. Boyd

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[FACSIMILE OF A MEMORANDUM OF SUN OIL]

Subject Thanh Vong Hoai - 004-4180-14

(Thanh Van Vo)

SUN
[Logo]

Interoffice Correspondence

Date June 18, 1987
Location Twin Oaks Terminal
From J.F. Prendergast
To J. Wagner

In accordance with your request, we attach hereto Company's check number 8742 dated June 17, 1987 in the amount of $10,300.03 made to the order of Thanh Van Vo per your request.

The enclosed check covers all open credits remaining on the subject account, and per your instructions, due to legal requirements, have made the check payable as outlined above.

In your correspondence with Mr. Van Vo it

should be made clear that any charges coming back to the account i.e. chargebacks, credit card differences, etc. will be his responsibility and that we will expect immediate payment of same.

We are sending a copy of this correspondence to our credit file as the subject account is now closed and in a deleted status. Should any additional information be required or if any additional assistance is needed, please feel free to contact the writer.

/jed cc: E. Peele
D. Snyder
Credit File

[FACSIMILE OF A LETTER FROM SUN OIL]

SUN

[Logo]

Sun Refining and
Marketing Company
4041 Market Street
Aston PA 19014
215 499 5700

January 22, 1987

Mr. Thanh Vong Hoai
2305 Pennsylvania Avenue, S.E.
Washington, DC 20020

RE: Contract No. 0004-4180-14

Dear Mr. Hoai:

Your one-year Dealer Trial [sic] Franchise

with Sun Refining and Marketing Company ("Sun") will expire March 31, 1987. When Sun entered into this franchise relationship with you on April 10, 1986, its performance expectations were for you, at a minimum, to match and moderately exceed the gallonage of your immediate predecessor.

Unfortunately, the operation of the station has not met Sun's expectations or standards. There has been a significant drop in the historical volume of gasoline sold from this station. I believe this is due in large part to the distractions caused by the dispute you are having with Thanh Van Vo. Regardless of the reasons, the operation of the stations has fallen well below Sun's standards. As a consequence, Sun has elected to non-renew your franchise effective April 27, 1987.

Attached to this notice is a Summary of Title I of the Petroleum Marketing Practices Act.

Very truly yours,

/s/ H J Vaughn
Harold J. Vaughn
Sales Manager

/jed

cc: David Hemenway, Esquire
Thanh Van Vo
J. Wagner, Esquire
E. Peele

Certified Mail
Return Receipt Requested

[FACSIMILE OF A LETTER FROM SUN OIL]

[Written six months after Hoai was removed from the station and three months after franchise termination]

SUN

[Logo]

Sun Refining and
Marketing Company
4041 Market Street
Aston PA 19014
215 499 5700

December 3, 1986

Thanh Vong Hoai
2305 Pennsylvania Ave., S.E.
Washington, DC 20020

Duns Number: 0004-4180-14

Dear Mr. Hoai:

Sun Refining and Marketing Company's (Sun's) representative called on you at the above address on November 26, 1986, to verify your compliance with Sun's Daily Recordkeeping and Inventory Control Program. Your contractual obligation regarding this matter is specifically outlined in your Dealer contract under the Daily Recordkeeping and Inventory Control Provisions.

These Provisions specify that you shall, on a daily basis, maintain adequate inventory records, on all petroleum product stored underground, including a reconciliation of sales, receipts, and inventory on hand. Said Provisions further specify that you shall permit Sun to inspect your underground storage inventory records, when Sun desires to monitor your compliance.

As you know, compliance with the Provisions of this Program is of benefit to you, Sun, and the general public, the purpose being to prevent product loss and environmental contamination. To assure compliance with these Provisions, each Dealer's underground storage inventory records are being verified, periodically, by Sun's representative.

Please be advised that Sun, as your supplier, views your failure to comply with the terms and conditions of this Program as a violation of a substantive provision of our franchise relationship, and of the above-mentioned provision of your Dealer contract.

Also, if you are not keeping proper gasoline inventory records, you are in violation of the Federal Occupational

Safety and Health Administration (OSHA), Service Station Regulation 1910.106(g), which specifically requires a Dealer to maintain and reconcile accurate DAILY physical and book inventory records of Dealer's underground storage of petroleum products to provide early detection of any leaks from such underground tanks and/or piping installation. In addition, there may be local, municipal and/or state laws which require petroleum storage inventory recordkeeping compliance.

Sun's representative will again call on you, at your location, in the next thirty (30) days, at which time we expect you to be in full compliance, in all respects, with the Provisions of the Daily Recordkeeping and Inventory Control Program.

The potential problems associated with leaks caused by petroleum products stored underground is of grave concern, and your complete cooperation is anticipated.

Very truly yours

SUNOCO MARKETING

/s/ H.J. Vaughn
H.J. Vaughn
Sales Manager

cc: Ernie Peele
Dealer File
H. Vaughn

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[FACSIMILE OF A LETTER FROM SUN OIL]
[Written six months after the franchise was destroyed by the Sun Oil Consent Agreement AND NOT Hoai, but extortionist Vo was in possession of the station, as Sun knew.]

SUN
[Logo]

Sun Refining and
Marketing Company
4041 Market Street
Aston PA 19014
215 499 5700

March 2, 1987
Duns Number: 0004-4180-14

Thanh Vong Hoai
2305 Pennsylvania Ave. S.E.
Washington, DC 20020

Dear Mr. Hoai:

Please refer to your Dealer Trial Franchise, dated March 27, 1986, between you and Sun Refining and Marketing Company, hereinafter referred to as "Sun". As you know, Sun's representative has attempted to verify your compliance with its Daily Recordkeeping and Inventory Control Provisions, as required in the above Franchise. Sun sent you a letter dated December 3, 1986, asking that you

comply with this provision. Your continued failure to comply with the requirements of this program leaves Sun no alternative but to terminate its franchise relationship with you.

Therefore, please take notice that effective April 7, 1987, Sun intends to terminate your Dealer Trial Franchise dated March 27, 1986, for the above-stated reason, and as per the following sections of the Federal Petroleum Marketing Practices Act:

Section 102(b)(2)(A)	Your failure to comply with a provision of the franchise, which is both reasonable and of material significance to the franchise relationship.
Section 102(b)(2)(B)	Your failure to exert good faith efforts to carry out the provisions of the franchise.
Section 102(c)(11)	Your knowing failure to comply with Federal, State or local laws or regulations relevant to the operation of the marketing

premises.

Attached to this notice is a Summary of Title 1 of the Federal Petroleum Marketing Practices Act.

Very truly yours,
SUNOCO MARKETING

/s/ H.J. Vaughn
H. J. Vaughn
Sales Manager

Attachment
cc: D.M. Zebley
H. L. Zoretic
E. L. Peele
B. J. Boyd

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

EXCERPTS FROM PREVIOUS HOAI DEALERSHIP

COLLATERAL DEPOSIT AGREEMENT

US Post Office Address	Contract No
Thanh Vong Hoai	0017-xx5-01
7906 Cherrywood Lane	District:
Greenbelt, Md. 20770	Wash/652

Federal Identification: 586-40-1891
State Code Number 39

THIS AGREEMENT, MADE THIS 26TH DAY OF AUGUST, 1981, BY AND BETWEEN SUN OIL COMPANY OF PENNSYLVANIA, A CORPORATION, HAVING ITS PRINCIPAL OFFICE AT 1608 WALNUT STREET, PHILADELPHIA, PENNSYLVANIA, HEREINAFTER CALLED COMPANY, AND THANH V. HOAI OF 7906 CHERRYWOOD LANE, COUNTY OF PRINCE GEORGE'S AND STATE OF MARYLAND 20770

* * * * *

Cash Portion of Deposit: $11,000

* * * * *

Witnesses at Signing
/s/J A Hagens /s/Thanh Vong Hoai
Sun Oil Company of Pennsylvania
By /s/ A. McCarthy
Credit Manager

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action
	:	No. 87-2456
SUN REFINING AND	:	Judge Oberdorfer
MARKETING CO.	:	Magistrate Attridge
Defendant.	:	

MOTION IN LIMINE
FOR DETERMINATION OF DAMAGES

This Court has entered partial summary judgment for plaintiff on the issue of liability under the Petroleum Marketing Practices Act by the Memorandum and Order filed on October 1, 1990. The court has also permitted the defendant to file this Motion In Limine to set forth the period of time for which the plaintiff may be entitled to claim damages.

By this endeavor to determine the time period for the damage claim, the defendant does not waive any rights or

objections to this court's opinion on liability. The defendant intends to preserve this issue for argument in another forum after a final judgment has been issued as to liability and damages.

Since this court has ruled that Sun terminated Mr. Hoai's franchise by the Consent Order of September 8, 1986; and, it is uncontroverted that the franchise was actually terminated by Sun with notice pursuant to the PMPA on April 27, 1987, it is therefore submitted that the period for the damages claimed by Mr. Hoai is within those inclusive dates.

* * * *

NOTICE TO SURRENDER PREMISES

CITY OF WASHINGTON :

:

DISTRICT OF COLUMBIA : ss:

:

aUGUST 25, 1986 :

TO: THANH VAN VO

You are hereby personally given notice to quit the premises located at 2305 Pennsylvania Ave., S.E., Washington, D.C. 20020, which is the Sunoco Service Station at that address.

You are to surrender the possession thereof and surrender all keys, records, supplies and equipmen now therein upon the service of this notice under penalty of the law.

You are further notified that failure to suit the premises will result in your

being named as a violator of Section 22-3101 of the Code of the District of Columbia, which can result in up to one year imprisonment.

You have been named in no legal capacity whatsoever that would justify your refusal to quit the premises by the legal holder of the lease, Thanh Vong Hoai, and your continued illegal presence on the property after the serving of this notice and after you have repeatedly threatened the legal leaseholder will not prove to be in your best interests.

/s/ John D. Hemenway
John D. Hemenway D.C. #379603
Attorney for Thanh Vong Hoai
(202) 371-6710

CERTIFICATE

I have read the within contained notice and certify that I am the legal holder of the Dealer Franchise for the Sunoco Station at 2305 Pennsylvania

Avenue, S.E., Washington, D.C. 20020 and that I have authorized Attorney John D. Hemenway to take all necessary action to remove Thanh Van Vo from the premises who has [r]ejected me, the rightful owner, and refused to leave.

August 25, 1986 /s/ Illegible
THANH VONG HOAI

STATEMENT OF WITNESS

I, Ernie Peel, am the company representative of SUNOCO, and I have witnessed Thanh Bong Hoai's signing of the within contained certificate and I can declare that he is the holder of the SUNOCO lease at 2305 Penn. Ave., SE and is the only person authorized to be in possession of this station.

August 25, 1986 /s/ Ernie Peele
Ernie Peel

[EXCERPTS FROM DEPOSITION OF DAVID ROSEMAN]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(CIVIL DIVISION)

THANH VONG HOAI,	)	
Plaintiff	)	
vs.	)	CA No.
SUN REFINING AND	)	87-2456
MARKETING CO.,	)	LFO/PJA
Defendant	)	
	)	

Washington, D.C.
Tuesday
June 25, 1991

Deposition of:

DAVID ROSEMAN

called for examination by counsel for the Plaintiffs, pursuant to notice, in the conference room, Jones, Day, Reavis and Pogue, 1450 G Street, N.W., 7th Floor, Washington, D.C.

* * * * *

Q [Elgin, counsel for Hoai] Who were you representing at that time when you had these conversations?

A [p.10] Mr. Thanh Van Vo.

* * * * *

Q * * * Did you have occasion to discuss with Mr Wagner [Sun's Attorney] the possibility of settling or compromising the conterversy between your client and the Sun Company?

* * * * *

A [p.12] During the course of my conversations with Mr. Wagner, we discussed the possibility of settling the dispute immediately before, immediately before the court involving the temporary restraining order and avoiding the necessity to go to a preliminary injunction hearing following the entry of the temporary restraining order.

Q Who were you told was representing Sun Oil?

A [p.13] Well, my first question to Mr. Wagner was, are you currently being

represented in connection with the lawsuit that was pending in the Superior Court between Mr. Vod and Mr. Hoai.

Q What did he say?

A * * * and it was at that point then that I began to discuss with Mr. Wagner what had taken place at the temporary restraining order hearing.

Q And by that, do you mean that you told Mr. Wagner what had taken place there?

A That's correct.

Q * * * [p.14] What did he [Wagner] say to you?

* * * * *

A Well, the substance was, what is the next step in the course of the proceeding? Where do you see this going from here? What is -- I think he may have asked me to what extent I saw a need for Sun Oil to be independently represented by counsel,

whether we were requesting any monetary damages from Sun Oil, that kind of thing, things that I guess we, as attorneys, would normally think that an in-house counsel would be immediately concerned about knowing that his company has just been sued.

* * * * *

Q [p15] You mentioned that there came a time in yhour conversation with Mr. Wagner when you discussed the possibility of avoiding a follow-on preliminary injunction hearing. Did I understand that correctly?

A That's correct.

* * * * *

Q * * * [p.16] Who initiated this topic, yourself or Mr. Wagner?

A Oh, I initiated it. * * * I do recall that he was receptive to the thought or to the concept of Sun Oil remaining as a

nejutral party in the dispute as opposed to taking an affirmative stand on either side of the dispute or becoming embroiled in unnecessary litigation.

Q When he discussed the possibility of Sun Oil becoming a neutral party, did hyou make any suggestions to him about how Sun Oil might accomplish that?

A Well, I initiated the suggestion that, in order to maintain the status quo, Sun simply agree to continue to supply petroleum products and related products to the lawful occupant of the service station.

Q And what did Mr. Wagner say when you suggested that>?

A Well, he reacted positively to that and, while I don't recall his specific words, the substance was that he thought that made a lot of sense based on Judge Wagner's ruling as to who the lawful

occupant of the service station was.

* * * * *

Q [p.20] Did you suggest to Mr. Wagner on that occasion any specific procedure by which this might be done, this elimination of the possibility of the follow-on preliminary injunction hearing?

* * * * *

A * * * the thought that I communicated to Mr. Wagner was that if Sun would simply agree to continue to provide the products to the lawful occupant of the service station, then inasmuch as my client was the [p.21] lawful occupant and had been reinstated in that capacity by Judge Wagner, that we did not see any need to go forward and seek any further equitable relief and I further noted the relevant federal rule of civil procedure, at least in that instance, would have been the counterpart Superior Court rule that

provided for a continuation of the temporary restraining order through a consent order procedure.

Q You're speaking of Rule 65?

A Yes. * * * [p.22] Following my conversation with Mr. Wagner, I drafted a form of consent order5 that I thought complied with the requirements of Rule 65 and faxed it off to Mr. Wagner for his review.

* * * * *

Q * * * [p.24] Now do I understand you to be saying that the draft was essentially negotiated between yourself and Mr. Wagner and then Mr. Forester's [Sun Oil attorney just entering case] signature line was added?

* * * * *

A * * * [p.27] I wouldn't characterize it as a negotiation. I'd characterize it as a reaction, a comment on a consent

order draft. I made changes as a result of that. I can not say for certain whether I did have a subsequent exchange with Mr. Wagner or not after that. It is possible. It's possible that we did it all in that one telephone conversation following the fax of the draft. **This was not discussed as being a significant matter**. [Emphasis added] This was discussed as being simply a way of maintaining the status quo while the laws[illegible] continued between Mr. Vo and Mr. Hoai.

Q You mentioned in one of your earlier answers that you had informed Mr. Wagner of the procedure by which a temporary restraining order might be extended through a consent order. Is that correct?

A Well, I mentioned the rule on injunctions, [the] [p.28] Superior Court rule on injunctions and noted that it was

very similar, if not identical to the corresponding federal rule of civil procedure. Now whether Mr. Wagner had independent knowledge of that, I don't know. I don't know that I was the first person to inform him of it, in other words.

* * * * *

Q [p.38] Were you aware that the Federal Petroleum Marketing Practices Act existed?

A [p.39] Yes.

Q How long had you known about it?

A I don't know how to answer that question. I don't have any particular awareness of a moment in time when I came to learn of it.

Q Let me rephrase the question.

A Let me finish, if I may. In my practice, I had heard of it and had some familiarity with it but nothing beyond

that.

Q Did your conversation with either Mr. Wagner or Mr. Forester in this period leading up to and through September the 8th include any discussion of the District of Columbia Retail Service Station Act?

A It did not.

Q Did you know that Act existed?

A At what time?

Q During this operative period.

A I probably did but I can not tell you when I came to know of the existence of that Act.

Q Did you have any discussion with either [p.40] Mr. Wagner or Mr. Forester in that period up to and through September the 8th, 1986 as to who was the franchisee of the gas station in question?

A I do not recall specifically discussing who the franchisee is. The subject of the lawsuit between Mr. Vo and

Mr. Hoai bore upon that so, to the extent that I explained the substance of our request for relief, I guess we could say that we touched upon that but, beyond that, I have no recollection.

* * * * *

Q [p.42] * * * Was there any discussion between you and either Mr. Wagner or Mr. Forester as to whether or not there should be a signature on this consent order on behalf of Mr. Hoai or the other two parties in the lawsuit?

A I don't recall any such discussion.

Q When you explained the procedure as you've described it for extending the TRO through a consent order to Mr. Wagner, did you mention to him or did he mention to you whether or not this could be done without notifying the other parties in the lawsuit?

A I don't recall discussing that at

all.

* * * * *

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

THANH VAN VO, D/B/A SUNTECH SUNOCO, INC.,	)	
Plaintiff,	)	Civil Action
v.	)	No. 7075-86
THANH VONG HOAI, et al.,	)	[SIGNED ON 9-08-86]
Defendants.	)	

CONSENT ORDER FOR EXTENSION OF TEMPORARY RESTRAINING ORDER AS TO DEFENDANT SUN REFINING AND MARKETING COMPANY

THIS MATTER having come before the

Court upon the pleadings and other papers heretofore filed herein and upon the representations of counsel and it appearing to the Court that on August 29, 1986, a Temporary Restraining Order was issued in this cause on motion of Plaintiff, Thanh Van Vo, after the hearing of testimony, and arguments of counsel; and it further appearing that the Plaintiff and Sun Refining and Marketing Company have, as evidenced by the endorsements hereon by counsel, agreed that the terms and conditions of the Temporary Restraining Order should be continued with respect to Plaintiff and Defendant Sun Refining and Marketing Company, until March 31, 1987 or the prior resolution of the dispute bnetween Plaintiff and Defendant Thanh Vong Hoai over rights to operate the gasoline startion at 2305 Pennsylvania Avenue,

S.e., Washington, D.C. as a franchisee and lessee of Sun Refining and Marketing Company, so long as Plaintiff complies with the terms and conditions of that certain one-year Dealer Trial Franshise Agreement appearing as Exhivit 1 to the Verified Complaint as if he were an original signatory thereto. A non-renewal of said Agreemnent or a termination for failure to comply with the terms and conditions thereof will not [-2-] be deemed a violation of this Consent Order. It is by the Court this 8 day of September, 1986,

ORDERED, that the following paragraph (2) of the Temporary Restraining Order of August 29, 1986 is hereby extended as to the Plaintiff and the Defendant, Sun Refining and Marketing Company, so as to continue to maintain the status quo ante as between Plaintiff and Defendant Sun

Refining and Marketing Company:

(2) That the Defendant, Sun Refining and Marketing Company, shall continue to supply the plaintiff with the branded petroleum products and to permit Plaintiff to operate the Station and to permit him to occupy the Station under the same terms and conditions as existed between Plaintiff and Sun Refining and Marketing Company prior to August 25, 1986. Such products are to be delivered so long as plaintiff pays the sums due for same.62

AND IT IS FURTHER ORDERED, that this extension shall continue until further order of this Court or until March 31, 1987 or the prior resolution of the dispute pending in this cause between the Plaintiff and Defendant, Thanh Vong Hoai, over rights to operate the gasoline station at 2305 Pennsylvania Avenue, S.E., Washington, D.C. as a granchisee and lessee of Sun Refining and Marketing Company and so long as Plaintiff continues to comnply with the terms and conditions

of that certain one-year Dealer Trial Franchise Agreement appearing as Exhibit 1 to the Verified Complaint as if it were an original signatory thereto,k it being the sense of this Consent Order that a non-renewal of said Agreement or a termination for failure to comply with the terms and conditions hereof will not be deemed a violation of this Consent Order;

AND IT IS FURTHER ORDERED, that a copy of said Restraining Order, together with a transcript of the Court's reasons therefor stated on the record and incorporated into the Temporary Restraining Order by reference is attached to and made a part of this Consent Order;

[-3-]

AND IT IS FURTHER ORDERED, that the cash bond posted by Plaintiff in the amount of $3,000 shall remain in effect for the duration of the Restraining Order

or until further order of the Court.

This Consent Order shall not be construed to extend the said Restraining Order as to any other defendant.

/s/ Stephen F. Eilperin
Judge
[stamp] "signed in chambers"

Seen and Agreed:

/s/ David C. Roseman
David C. Roseman per MFO
D>C> Bar No. 226969
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Retail Service Stations

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Section 10-225. Sale, assignment, or other transfer of a marketing agreement.

(a) No distributor shall unreasonably withhold his approval of any sale, assignment, or other transfer, including any transfer of the retail dealer's aright, privilege, or authority to occupy a retail service station pursuant to a marketing agreement, of a marketing agreement or any interest therein to another person by a retail dealer.

(b) No retail dealer shall sell, assign, or otherwise transfer a marketing agreement or any interest therein unless he furnishes prior written notice to the distributor of his intention to make such sale, assignment, or other transfer. Such notice shall be sent to the distributor by

registered or certified mail and shall include the prospective transferee's name and address, a statement of the prospective transferee's financial qualifications, a statement of the prospective transferee's business experience during the previous 5 years, and a statement of the prospective transferee's ability, character, and credit history.

(c) The distributor shall either approve or disapprove such sale, assignment, or other transfer in writing within 60 days after receipt of the notice specified in subsection (b) of this section. A distributor's failure to notify the retail dealer of his approval or disapproval shall be construed as an approval of the proposed sale, assignment, or other transfer.

(d) In order for a sale, assignment,

or other transfer of a marketing agreement to be valid, the prospective transferee shall agree in writing to comply with all valid requirements, conditions, and provisions of the existing marketing agreement which may be applicable.

(e) (1) A prospective transferee shall have the right to terminate or repudiate any sale, assignment, or other transfer of a marketing agreement or any interest therein for any reason, without the imposition of any damages or penalties for such action and without any recourse by the transferor or distributor for such action, within 7 days, not including Saturdays, Sundays, or holidays, after the day on which the sale, assignment, or other transfer is consummated. In order to exercise his right under this subsection, the transferee shall:

(A) Mail written notice, by

registered or certified mail, to the transferor and the distributor of his intention to exercise his right under this subsection within the period specified in this subsection;

(B) Discontinue use of any trademark presently being used by such transferee pursuant to the marketing agreement;

(C) Deliver or tender, so far as is practical, to the transferor or distributor, as appropriate, all money, equipment, and merchantable products which have been loaned, sold or delivered to the transferee by either the transferor or the distributor and which the transferee has not already sold, within 10 days after mailing the notice specified in this subsection; and

(D) Deliver or tender to the transferor full possession of any

retail service station transferred to the transferee within 10 days after mailing the notice specified in this subsection.

(2) The transferee shall receive full credit; or the cash equivalent, for all money, equipment, and merchantable products delivered or tendered to the transferor or distributor, as appropriate, pursuant to subparagraph (C) of paragraph (1) of this subsection. Nothing contained within this subsection shall be construed as granting a similar right to terminate or repudiate to either the transferor or the distributor.

(f) (1) Upon the death or retirement of a retail dealer, the distributor shall grant a 1-year trial marketing agreement in the name of a successor who has been designated by the retail dealer and approved by the distributor. The designated successors shall be limited to

a retail dealer's spouse, adult children, adult stepchildren, and the approval of the designated successor by the distributor shall not be unreasonably withheld.

(2) In order for the requirement in paragraph (1) of this subsection to be effective, the retail dealer shall have provided written notice to the distributor designating the successor dealer. The distributor shall approve or disapprove the designated successor, in writing, within 60 days after receipt of the written designation notice. A distributor's failure to notify a retail dealer of the approval or disapproval of any designated successor shall be construed as an approval of the designated successor.

(3) A 1-year trial marketing agreement shall contain the same terms and

conditions as were contained in the marketing agreement in effect prior to the retail dealer's death or retirement. Pursuant to the provisions of this subchapter, a successor dealer, with the approval of the distributor, may sell, assign, or otherwise transfer the trial marketing agreement granted under paragraph (1) of this subsection.

Section 10-226. Civil Actions

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(b) No prospective transferee shall have a cause of action against a distributor as a result of the distributor's disapproval of a proposed sale, assignment, or other transfer of a marketing agreement.

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[This Chapter contains an additional five pages.]

UNITED STATES CODE

1988 Edition

CHAPTER 55. PETROLEUM MARKETING PRACTICES

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Section 2801. Definitions

As used in this title:

(1)(A) The term "franchise" means any contract--

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(ii) between a refiner and a retailer,

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under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies

motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes--

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed--

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which

has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(iii) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a

refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

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(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in

connection with the sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of an agreement to deliver such levels.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type

distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure does not include--

(A) any failure which is only technical or unimportant to the franchise relationship; or

(B) any failure for a cause beyond the reasonable control of the franchisee.

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship--

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) at any time, in the case of

the relevant franchise which does not state a term of duration or an expiration date; or

(C) following a termination (on or after the date of enactment of this Act [enacted June 19, 1978] of the relevant franchise which was entered into prior to such date of enactment and has not been renewed after such date.

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(17) The term "termination" includes cancellation.

(18) The term "commerce" means any trade, traffic, transportation, exchange, or other commerce--

(A) between any State and any place outside of such State; or

(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State

of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

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Section 2802. Franchise relationship

(a) General prohibition against termination or non-renewal

Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may--

(1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise

relationship (without regard to the date on which the relevant franchise was entered into or renewed).

(b) Precondition and grounds for termination or non-renewal

(1) Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if--

(A) the notification requirements of section 2804 of this title are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination

of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure--

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(B) A failure by the franchisee to

exert good faith efforts to carry out the provisions of the franchise, if--

(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 2804 of this title.

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive

knowledge of such occurrence--

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 104(b)(1)[15USCS Section 2804(b)(1)].

(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if--

(i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days prior to the conclusion of the term, or the expiration date, stated in the franchise;

(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 104(d) [15USCS

Section 2804(d)]; and

(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(E) In the case of any franchise entered into prior to the date of the enactment of this Act [enacted June 19, 1978], and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are

located, if--

(i) such determination--

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises--

(I) the franchisor, during the 180-day period after notification was given pursuant to section 104 [15 USCS Section 2804], either made a bona fide offer to sell, transfer, or assign to the

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if--

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.

(B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises, if--

(i) the franchisee was promptly

entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if--

(i) such determination is--

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(c) Definition

As used in subsection (b)(2)(C) of this section, the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as--

(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to

violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;

(9) Failure by the franchisee to operated the marketing premises for--

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration,

renewed)--

(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5) of this section, the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(2) if such termination or nonrenewal is based upon an event described in subsection (c)(7) of this section and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and operated under a franchise, the franchisor shall, within a reasonable period of time, grant to the franchisee a right of first refusal of the franchise under which such premises are to be operated.

Section 2803. Trial and interim franchises

(D) which is in writing and states clearly and conspicuously--

(i) that the franchise is a trial franchise;

(ii) the duration of the initial term of the franchise;

(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of the initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section 2804 of this title, of the franchisor's intention not to renew the franchise relationship; and

(iv) that the provisions of section 2802 of this title, limiting the right of a franchisor to fail to renew a franchise relationship are not applicable to such trial franchise.

(2) The term "trial franchise" does

a prior franchise, applicable to the marketing premises, which was not renewed if such nonrenewal--

(i) was based upon a determination described in section 2802(b)(2)(E) of this title, and

(ii) the requirements of section 2802(b)(2)(E) of this title were satisfied; and

(D) which is in writing and states clearly and conspicuously--

(i) that the franchise is an interim franchise;

(ii) the duration of the franchise; and

(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from

upon a determination described in section 2802(b)(2)(E) of this title; and

(B) the requirements of section 2802(b)(2)(E) of this title are satisfied.

Section 2804. Notification of termination or nonrenewal of franchise relationship

(a) General requirements applicable to franchisor

Prior to termination of any franchise or non-renewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship--

(1) in the manner described in subsection (c) of this section; and

(2) except as provided in subsection (b) of this section, not less than 90 days

such premises before the expiration of the 30-day period which begins--

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and

(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 2802(b)(2)(E) of this title or section 2803(c)(2) of this title, the franchisor shall--

(A) furnish notification to the

not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d) of this section.

(d) Preparation, publication, etc., of statutory summaries

(1) Not later than 30 days after June 19, 1978, the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this subchapter, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this subchapter.

(2) In the case of summaries required

to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 2802 or 2803 of this title.

(b) Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers

(1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court

on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) of this section to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a) of this section, the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was commenced--

(A) more than 90 days after the date on which notification pursuant to

franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title.

(d) Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions

(1) If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled- (A) consistent with the Federal Rules of Civil Procedure, to

(a) of this section, the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

(e) Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected

(1) In any action under subsection (a) of this section with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the

to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 2804 of this title have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) of this section if such nonrenewal is prohibited by section 2802 of this title.

Section 2806. Relationship of statutory provisions to State and local laws

(a) Termination or nonrenewal of franchise

To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to

the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

(b) Transfer or assignment of franchise

Nothing in this subchapter authorizes any transfer or assignment of any

franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

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[There follows Subchapter II concerning Octane Disclosure under the PMPA]